Supreme Court, U.S.
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No. 08-581

In The

Supreme Court of the United States

JASON JULES FERNANDES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether utilization of the "knock and talk" investigative procedure at the front door of a person's residence is a "consensual encounter" and a "reasonable" investigative procedure under the Fourth Amendment where the officers do not have "reasonable suspicion," deliberately misrepresent the purpose for their presence, fail to notify the resident that he has the right to tell them to leave and does not have to speak with them, and induce the resident to speak with them by promising to leave if he complies with their requests?

PARTIES TO THE PROCEEDING

Petitioner is Jason Jules Fernandes, defendant-appellant below.

Respondent is the United States of America, who has lawful custody of petitioner pursuant to the judgment and commitment in the district court.

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OPINIONS BELOW

The district court's opinions denying Fernandes' motion to suppress and his motion for reconsideration of his motion to suppress are at App. 18-36 and App. 37-71, respectively. The unpublished opinion of the court of appeals is at App. 1-17. The denial of rehearing by the court of appeals is at App. 72-73.

STATEMENT OF JURISDICTION

The court of appeals had jurisdiction under 28 U.S.C. § 1291. This Court has certiorari jurisdiction under 28 U.S.C. § 1254(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Amendment IV: The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

A. Procedural History

On January 31, 2007, Fernandes was arrested at his garage apartment at 3309 Helms Street, Austin, Texas, by Austin Police Department Detectives Jon Walker and Jason Bryant. Although state charges were immediately filed against Fernandes, a federal complaint alleging possession with intent to distribute LSD was subsequently filed and he was arrested on that complaint. 1ER11, 15. Thereafter, the original federal indictment was returned, which alleged possession with intent to distribute LSD. 1ER22. Fernandes timely filed a motion to suppress and an amended motion to suppress. 1ER40-60, 1ER61-81. A superseding indictment containing two counts was subsequently returned: count 1 being identical to the original indictment and count 2 alleging possession of a firearm in furtherance of a drug trafficking crime. 1ER82-84.

After an evidentiary hearing was held on Fernandes' amended motion to suppress. 1TR1 *et seq.*, the district court entered a written order denying the amended motion to suppress. App. 18-36. Fernandes' motion for reconsideration was denied by written order of the district court on June 28, 2008. 2ER269-294; App. 37-71.

Pursuant to a written plea bargain agreement, 2ER296-302, a conditional plea of guilty to both counts was entered. 4TR1 *et seq*. Therein, Fernandes reserved the right to appeal all issues regarding the

district court's denial of his suppression motions. 2ER299.

On August 31, 2007, Fernandes was sentenced to an advisory guideline sentence of 87 months on count 1, and a mandatory 60 months on count two, to run consecutive to count one. 2ER333-339. Appropriate special assessments and terms of supervised release were also imposed. *Id.* Notice of appeal was timely filed. 2ER323.

The court of appeals upheld the district court's denial of Fernandes' suppress issues on July 10, 2008. App. 1-17, and denied rehearing on August 5, 2008. App. 72-73.

B. Factual Summary

At undetermined dates prior to January 31, 2007, Detective Walker of the Austin Police Department learned from a confidential informant (hereinafter CI, although labeled a "concerned citizen" by Walker), that Jason Fernandes, a University of Texas student, lived in a garage apartment at a house on a north-south street north of 33rd Street that often had a maroon Saturn parked outside. 1TR16. According to the CI, Fernandes sold marijuana and psychedelic mushrooms, 1TR16, and "was in possession of a .45 caliber, semi-automatic handgun." 1TR30, 40.[1]

[1] The district court concluded that the CI had informed the detectives that Fernandes "habitually" kept a gun in the residence. App. 19.

Because Walker did not trust the motivations of the CI, he attempted to corroborate the information. 1TR18. Walker was able to locate a garage apartment at 3309 Helms Street and verified that the utility records for that location were listed to Fernandes. 1TR17. Walker also verified, from the utility records, Fernandes' phone number supplied by the CI. 1TR17. However, Walker did not conduct any other investigation, including any "trash hits"[2] of the trash cans outside of the residence, to attempt to verify the CI's information regarding Fernandes' alleged drug dealings. 1TR43, 48-49.

Because Walker had been unable to corroborate any aspect of the CI's information regarding the distribution of illegal narcotics, 1TR17, and did not have probable cause to obtain a search warrant, 1TR17, or "reasonable suspicion" to believe Fernandes was trafficking drugs, 1TR42, 49,[3] Walker decided

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[2] Walker testified a "trash hit" is an investigative tactic used by the Austin Police Department to determine whether a resident is dealing in illegal substances due to the presence of baggies, drug debris, etc., being thrown away. 1TR43. This type of investigative technique has been approved by this Court when the garbage bags have been left outside the curtilage of a residence. *California v. Greenwood*, 486 U.S. 35 (1988). Walker admitted he could have done performed a "trash hit" at Fernandes' residence, although he added it was much less pleasant than simply talking to the resident. *Id.*

[3] The government's response to Fernandes' suppression motion, filed on the morning of the suppression hearing, stated that the detectives had been "unable to corroborate the concerned citizen's information with respect to the distribution of

(Continued on following page)

to go to 3309 Helms Street in the early afternoon of January 31, 2007, and conduct what he termed a "consensual" "knock and talk."[4] 1TR20. Accompanied by his partner, Detective Jason Bryant, Walker arrived at the address at 12:30 p.m. 1TR20. Walker and Bryant were in plain clothes. 1TR20-21. Although both had weapons, they were not visible. 1TR21-22. Walker was carrying a digital tape recorder which he activated.

Walker went up the steps to the landing adjacent to the front door of the second story garage apartment and knocked on the front door. The transcript of the audio recording and the audio recording itself reflect the following during the critical first few minutes of the encounter:

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illegal narcotics" and did not "know[ ] the concerned citizen's true motivation in supplying this information." 1ER90. The district court noted that "[t]he purpose of the knock-and-talk was to corroborate the informant's statements regarding Defendant's criminal activity." App. 40. The district court also concluded that "[b]y the time the incident 'escalated to the level of a "limited investigative stop,"' [Fernandes] had already created reasonable suspicion justifying a *Terry* stop by producing drug paraphernalia and admitting that he had marijuana in his apartment." App. 50.

[4] A "knock and talk" is an "investigative tactic" used by law enforcement "to gain an occupant's consent to search or where officers reasonably suspect criminal activity." *United States v. Gomez-Moreno*, 479 F.3d 350, 355 (5th Cir. 2007). *See* cases cited *infra*, at App. 25 to App. 27.

(KNOCKING ON DOOR):

FERNANDES: May I help you?[5]

WALKER: Yea. Are you Jason?

FERNANDES: Yea. Who is it?[6]

WALKER: Jason, I'm Jon Walker. I'm with the police department.[7] Hoping I could talk with you outside for a minute.

FERNANDES: (complies).[8]

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[5] The testimony at the suppression hearing reflected that the detectives could not see inside the apartment from the landing outside of the front doors, as there was a screen door and an exterior glass entry door, with the glass entry door being covered with fabric and bamboo. 1TR116.

[6] When the "detectives knocked on Fernandes door," App. 8, Fernandes went to the door and moved the fabric and bamboo and saw two people outside. 1TR116. After Walker identified himself and displayed his badge, 1TR57-58, Fernandes was "fairly nervous" because "two detectives showed up at his door." 1TR147. Fernandes testified he spoke with Walker through the closed front doors, which Walker agreed was accurate. 1TR53.

[7] The court of appeals noted that the "[d]etectives knocked on Fernandes' door and asked if they could speak with him outside," and that "[n]o force or show of authority was made to gain Fernandes' compliance," App. 8, ignoring the uncontested testimony from Walker that he had displayed his "badge" to Fernandes at the time he identified himself as a police department officer. 1TR22; 57-58.

[8] Fernandes testified that he opened the front door as little as possible and squeezed out, closing the door behind him. He did this because his girlfriend and he had just started smoking marijuana, he had materials in his apartment he did not want the police to see, and he did not know that he did not have to

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WALKER: This is my partner, Detective Bryant.[9] *Could we talk to you downstairs for a minute?*

FERNANDES: Sure.

WALKER: *After you.*[10] Anybody else home right now, Jason?

FERNANDES: My girlfriend.

WALKER: I'm sorry?

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speak with the detectives or that he could tell them to leave his front door. 1TR118-119.

[9] Fernandes and Walker both testified they were on the small landing outside of the front door at this time. Walker asserted that Bryant was at the base of the stairs, whereas Fernandes claimed Bryant was a step or two down from the top of the landing. 1TR118.

[10] Fernandes position was that he was "sandwiched" by the officers when he exited his apartment and stepped out onto the small wooden deck on the second story of the garage apartment. As Walker said "after you," Walker put his arm on and/or around Fernandes' shoulder at the top of the stairs as if to marshal Fernandes down the stairs. 1TR57, 141-42, which Walker testified was for the detectives' safety. 1TR23. Walker testified that he did not remember any physical contact, but admitted it was possible. 1TR57. Because the court of appeals did not mention the uncontroverted fact that Walker displayed his "badge" to Fernandes, 1TR22, 57-58, it did not address whether Fernandes had submitted to a show of authority when he stepped outside of his apartment. As to Fernandes' further assertion that Walker's action in putting his arm around Fernandes as if to marshal him down the stairs was also a "seizure," the court of appeals concluded that "any physical contact" "did not constitute a show of authority or physical restraint." App. 9.

FERNANDES: My girlfriend.

WALKER: What's her name?

FERNANDES: Jackie.

WALKER: I'm sorry?

FERNANDES: Jackie.

BRYANT: Jackie.

WALKER: Okay,[11] *let me explain why we stopped by. Somebody called in and complained that you-all are smoking a little weed here. They could smell it coming out the vents or something, okay.*[12]

FERNANDES: All right.

WALKER: *This is campus.*

FERNANDES: I'm sorry.

WALKER: Okay. *People smoke weed over here. I'm aware of that. But when you call in and make a complaint, I've got to respond to and do something about it.*

FERNANDES: I'm sorry.

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[11] The following occurred at the bottom of the stairs at ground level, which was in the side yard to the residence.

[12] Walker testified this "complaint" was fictitious and that he misrepresented their purpose to attempt to induce Fernandes to speak with them. 1TR55-56.

WALKER: *So I figured I would just stop by and talk to you and say, If you're smoking a little weed, you need to stop, okay.*

FERNANDES: I'm sorry.

WALKER: *And if you've got any bongs in the house, you need to get rid of them.*

FERNANDES: Okay.[13]

WALKER: Do you have any bongs in the house?

FERNANDES: I have some downstairs.[14]

WALKER: Downstairs where?

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[13] Initially, Walker said his "agenda" was to tell Fernandes to "stop smoking" and "get rid of his bongs" himself. Fernandes said "okay." When Fernandes agreed to get rid of his bongs himself, Walker decided he "needed" to obtain "the bongs", so that he could show that he "responded to the complaint" and then he would "go away". Even though Walker suspected that Fernandes had marijuana, Walker specifically did not ask for the marijuana at the same time he asked for the bongs. Rather, Walker essentially asked for the most innocuous thing – the bongs – and not the marijuana in order to attempt to gain entry into the house, always making it seem to Fernandes that he would leave if his last request would be satisfied.

[14] Walker expected the bongs to be in the apartment and was trying to get Fernandes to go upstairs and inside the apartment to get the bongs so the detectives could gain access to the apartment. However, Walker was thrown a "curve-ball" when Fernandes was able to satisfy Walker's demand for the bongs without going back upstairs and into the apartment, instead, retrieving bongs from his garage.

FERNANDES: Oh, it's just in my garage. *I will get rid of them.*

WALKER: *Do you have any up there?*[15]

FERNANDES: No.

WALKER: Okay. Is your girlfriend in there right now?

FERNANDES: Yes.

WALKER: And what's her name again?

FERNANDES: Jackie.

WALKER: Jackie. So there's no –

FERNANDES: I don't want to get her in any trouble.

WALKER: *Well, I don't want you to get in any trouble. That's not why I'm here. I'm here to respond to a complaint.*

FERNANDES: Yes, sir.

WALKER: *And if I can respond to this complaint and say I've spoke to Jason, and he gave me the bong, and I went away, then we're over with it, okay.*[16]

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[15] Walker was again referring to the upstairs apartment at this point.

[16] Fernandes asserted in the district court and on appeal that this statement by Walker was a "promise" to leave if Fernandes gave them his bongs, which rendered his statements in reliance thereon involuntary. Both the district court and the court of appeals held Walker's comment "[a]nd if I can respond

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FERNANDES: Yes, sir.

WALKER: Do you want to go *up* and get the bong out of your –[17]

FERNANDES: It's out here (indicating), sir.[18]

WALKER: Okay.

After Fernandes, accompanied by the detectives, retrieved his bongs from the garage, the detectives then asked him if he had a small bag of marijuana.[19] Fernandes admitted he did, indicating it was upstairs in his apartment. The detectives asked Fernandes to take them upstairs and into the apartment and obtain the marijuana, but Fernandes told them he did not want them to go into his apartment, instead requesting to go inside his apartment by himself to retrieve the marijuana. However, the detectives told him that he could not go back into his apartment by

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to this complaint and say I've spoken with Jason, and he gave me the bong, and I went away, then we're over with it, okay" to be "at most an implication of leniency" without "the potency of [a] direct promise[ ]" and did not render Fernandes' statements involuntary. App. 12, 25-26.

[17] Walker was again referring to the upstairs apartment.

[18] Fernandes was indicating that the bongs were in his garage, which was on the ground level around the corner from where they were talking. *See* Def. Ex. 1-6.

[19] Because the detectives were there to investigate drug trafficking, they still needed to gain access to the upstairs garage apartment, even after obtaining Fernandes' bongs. It was at this point that Detective Bryant asked Fernandes for his marijuana as a "second chance" to gain access to the apartment.

himself because he could destroy the marijuana. The detectives then directed Fernandes back upstairs to the landing outside of the front door of the apartment and also directed Fernandes' girlfriend, Jackie, to come out of the apartment[20] and to go down the stairs and have a seat. After Jackie had moved down the stairs, Fernandes told the detectives he would just go in and grab the marijuana and step back outside. As Fernandes did so, Walker asked to follow Fernandes inside. Walker, claiming that Fernandes had said "yes" to his request to follow Fernandes inside, went into the apartment while Fernandes retrieved his marijuana. While inside the apartment, Walker observed other items. After Fernandes and Walker exited the apartment, Fernandes was escorted back down the stairs where the following ensued:

> WALKER: *Here's what I would like to do before I leave. I would like to go through your entire apartment and take anything illegal out of it. And you can either let me do that or tell me that you don't want me to. And that's up to you. But your decision is going to affect how this investigation goes. I want you to know that. And right now, so far we've been cooperative with each other, and we're doing*

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[20] Walker's statements were less than clear, except that he did not want Fernandes to go back into the apartment by himself. Walker did not tell Fernandes to tell Jackie to bring the marijuana out with her nor did Walker tell Jackie to bring the marijuana out.

everything to try to help each other out, and everything is on friendly terms.

FERNANDES: *Can I have some time to talk to a lawyer or something?*[21]

WALKER: If you want to talk to a lawyer, I have to stop talking to you.

FERNANDES: *I mean, I would like to get back with you-all.*

WALKER: Okay. Getting back with us won't – won't change what we're going to do here today. Because we're not leaving until we're done with our little *investigation* here.

FERNANDES: *I mean, I don't – I wouldn't like my apartment searched.*

WALKER: Okay. Well, that's your *right*.

After 43 minutes of recorded conversations, Walker left and obtained a search warrant based upon an affidavit he prepared. *See* Def. Ex. 18; Court Exhibit 1 (audio recording on CD). However, well before Walker left to obtain the warrant, he went back

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[21] Fernandes had never before been involved with the police except when he was "robbed" in Austin. 1TR147. Fernandes admitted that he was generally aware of the *Miranda* rights, but repeatedly claimed not to be aware that he did not have to talk to the detectives, particularly before the detectives administered *Miranda* rights to him. 1TR118-119, 147-149. According to Fernandes, he thought he had the legal obligation to speak with them until such time as they officially advised him that he had the right to remain silent. 1TR119, 147-148.

upstairs and into the apartment to take photographs of what he had seen when he followed Fernandes into the apartment.

After Walker obtained a search warrant and returned with other officers, Fernandes' apartment and garage were searched and additional photographs were taken. The LSD and gun which formed the basis of the two count indictment were found in the upstairs apartment.

B. Fernandes' Position In The District Court And On Appeal

Fernandes asserted in the district court and on appeal that: (1) the encounter was not consensual, but rather an unlawful seizure under the Fourth Amendment; (2) Fernandes' statements were involuntary (due to Walker's "promises") and the fruit of the initial illegal seizure; (3) Walker's entry into the apartment (without a warrant, on both occasions) was illegal as well as the fruit of the initial illegal seizure; and (4) the entire scenario was tainted due to Walker's misrepresentations of the purpose of why the detectives wanted to speak with Fernandes. The district court held that the encounter was a "consensual" "knock and talk," App. 26-30, 49-51, 63-67, that Fernandes' statements were voluntary and not induced by Walker's promise to leave if Fernandes gave him his bong(s), App. 24-26, 53-63, and that Walker's entry into his apartment was consensual or, alternatively, based on exigent circumstances. App. 30-34,

47-48, 67-68. The court of appeals affirmed the district court's holding without reaching the issue of exigent circumstances. App. 1-17.

REASONS FOR REVIEW

The issue is whether this "knock and talk" was a "consensual" encounter – as opposed to a "seizure" – and a "reasonable" investigative tactic in the absence of "reasonable suspicion" and notification to Fernandes that he had the right to tell the detectives to leave and did not need to step outside his residence and speak with them. Was Fernandes "seized" when he submitted to Walker's show of authority – identification as a police officer and display of his badge – and complied with Walker's request to step outside the front door of his "castle" and speak with them?

Review is necessary and appropriate because the "knock and talk" orchestrated by the detectives was "unreasonable"[22] under the Fourth Amendment. While the Court consistently has held that police officers may approach a person in a public place without implicating the Fourth Amendment, the Court previously has not addressed whether utilization of the "knock and

[22] The "touchstone of the Fourth Amendment is reasonableness." *Ohio v. Robinette*, 519 U.S. 33, 39 (1996) (quoting *Florida v. Jimeno*, 500 U.S. 248, 250 (1991)). Reasonableness is measured in objective terms by examining the totality of the circumstances. *Id.*

talk" investigative procedure at the front door of a person's "castle" constitutes a "seizure" and thus must be supported by "reasonable suspicion," let alone where the officers misrepresent the purpose for the encounter, make promises designed to lull the resident into revealing information designed to supply "reasonable suspicion," "probable cause" or otherwise justify their entry into the person's "castle," and fail to provide notice to the resident that he has the right to tell them to leave without answering their questions. This is an issue of nationwide significance for state and federal law enforcement, as well as for the approximately 305 million people (including 37 million plus immigrants, legal and illegal) residing in the United States.[23]

1. The Issue Of Whether A Person Is "Seized" Within The Meaning Of The Fourth Amendment When Police Officers Knock On The Front Door Of A Residence, Display Their Badges, And Ask To Speak With The Person Outside Of The Residence Is A Question Of National Importance.

A seizure occurs when an officer, "'by means of physical force or show of authority,'" terminates or

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[23] According to data collected from the March 2007 Current Population Survey (CPS) collected by the Census Bureau, there were 37.9 million immigrants (legal and illegal) in the United States or roughly one in eight.

restrains a person's freedom of movement." *Florida v. Bostick*, 501 U.S. 429, 434 (1991) (quoting *Terry v. Ohio*, 392 U.S. 1, 19 n. 16 (1968)); *see also California v. Hodari D.*, 499 U.S. 621, 628 (1991) (A "show of authority" exists when "the officer's words and actions would have convey[ed] the message [to a reasonable person] that he was not free to disregard the police and go about his business").

When the actions and words of the police do not show an unambiguous intent to restrain or when a person's submission to a show of police authority takes the form of passive acquiescence, a seizure occurs if "in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *United States v. Mendenhall*, 446 U.S. 544, 554 (1980); *Hodari D.*, *supra*, at 627; *Michigan v. Chesternut*, 486 U.S. 567, 573 (1988); *INS v. Delgado*, 466 U.S. 210, 215 (1984).

However, when a person "has no desire to leave" for reasons unrelated to the officers presence, the "coercive effect of the encounter" can be measured better by asking whether "a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter." *Bostick*, *supra*, at 435-436; *see also United States v. Drayton*, 536 U.S. 194, 202 (2002).[24]

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[24] The Court did not actually decide whether Bostick had been "seized" during the drug interdiction efforts on the bus. 501

(Continued on following page)

This Court has "held repeatedly that mere police questioning does not constitute a seizure." *Bostick*, *supra*, at 434; *see also INS v. Delgado*, *supra*, at 212. "[E]ven when officers have no basis for suspecting a particular individual, they may generally ask questions of that individual; ask to examine the individual's identification; and request consent to search his or her luggage." *Bostick*, *supra*, at 434-435. As noted in *Bostick*, *supra*, at 479, "law enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions."[25] And in *United States v. Drayton*, *supra*, the Court held that the Fourth Amendment does not require police officers to advise passengers on a bus of their right not to answer questions and their right to refuse consent to search. 536 U.S., at 206-207.

U.S., at 437. In *Drayton*, however, the Court concluded that Drayton had not been seized during the drug interdiction efforts on the bus because "nothing [the officer] said would suggest to a reasonable person that he or she was barred from leaving the bus or otherwise terminating the encounter." 536 U.S., at 204 (explanation added).

[25] *Bostick* and its progeny do not provide clarity as to whether the Fourth Amendment analysis established by the Court in *Bostick* applies when the police knock on the front door of a person's "castle."

Simply stated, should the rules outlined above apply when the police knock on the front door[26] of a person's "castle"? Should the police be allowed to go to the front door of a person's "castle" without "reasonable suspicion," display a badge[27] and request the resident to step outside, only to misrepresent the purpose of their visit to induce the resident to speak with them while making promises designed to induce the production of incriminatory statements or evidence? These are questions which have not been but should be addressed by this Court because the Fourth Amendment was adopted to curb the "misuse of power" which had long been employed to infringe upon the rights of the people to be secure in their persons and houses, *Byars v. United States*, 273 U.S. 28, 33 (1927), and because "[a]t the very core [of the Fourth Amendment] stands the right of man to retreat into his own home and there be free from unreasonable governmental intrusion." *United States*

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[26] The analysis for the front door may be different than when officers proceed to the back door, although a number of the courts of appeals have held that a "knock and talk" can be extended to the back door or backyard under certain circumstances. *See Estate of Smith*, 318 F.3d 497, 520-521 (3rd Cir. 2003); *United States v. Bradshaw*, 490 F.2d 1097, 1100 (4th Cir. 1974); *Hardesty v. Hamburg*, 461 F.3d 646, 654 (6th Cir. 2006); *United States v. Anderson*, 552 F.2d 1296, 1300 (8th Cir. 1977); *United States v. Hammett*, 236 F.3d 1054, 1060 (9th Cir. 2001).

[27] In *Florida v. Rodriguez*, 469 U.S. 1 at 5-6 (1984), the Court rejected the claim that the defendant was seized when an officer approached him in an airport, showed him his badge, and asked him to answer questions.

v. Payton, 445 U.S. 573, 589-590 (1980). Just as physically invasive inspection of luggage is more intrusive than purely visual inspection, *Bond v. United States*, 529 U.S. 334, 337 (2000), approaching the front door of a person's "castle" to attempt to question the resident without "reasonable suspicion" and with the ultimate goal of obtaining warrantless entry to the residence is far more intrusive than a telephone call to the resident or the pursuit of normal investigative techniques.

Fernandes asserts that the Fourth Amendment requires officers, intent upon investigating criminal activity allegedly committed by the resident, to approach the front door of the "castle" only when they possess "reasonable suspicion" and that they must also inform the resident upon whose door they knock that there is no obligation to speak with them and that upon request, they will leave the residence.[28] Such a rule is the only manner by which the presence of the police knocking on the door of the "castle" can be viewed as not inherently coercive and is necessary

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[28] *Drayton*, *Ohio v. Robinette*, *supra*, at 39-40, and *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973), all support the conclusion that police officers need not always inform citizens of their right to refuse when seeking permission to conduct a warrantless consent search. None of these cases, however, involved a "knock and talk" at the front door of a resident's "castle." At least two state courts have required officers to inform individuals of their right to refuse consent to search during a "knock and talk." *State v. Brown*, 156 S.W.3d 722, 726 (Ark. 2004); *State v. Ferrier*, 960 P.2d 927 (Wash. 1998).

to ensure that the police conduct communicates to a reasonable person that he is in fact at liberty to ignore the police presence and go about his business within his residence without negative ramifications from the exercise of Fourth Amendment rights.

Here, the detectives admitted they did not possess "reasonable suspicion" and also admitted that they did not inform Fernandes that he did not have to speak with them, or that he could tell them to leave his front door. In the context of an encounter on a bus, no such warning is required by the Fourth Amendment. *United States v. Drayton*, *supra*. And in determining whether consent to search is freely given, a warning is also not required, although the absence of a warning is a factor to be considered. *Schneckloth v. Bustamonte*, *supra*. While reliable statistics have not been located,[29] it is not problematic that the vast majority of people living in the United States are unaware that when the police knock on their front door, they have the right to tell the police to "go away," "leave me alone," and that they do not

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[29] In *Brendlin v. California*, ___ U.S. ___, 127 S.Ct. 2400 (2007), the Court noted that its opinions "probably reflect[s] a societal expectation of 'unquestioned [police] command' at odds with any notion that a passenger would feel free to leave, or to terminate the personal encounter any other way, without advance permission" from the police (quoting *Maryland v. Wilson*, 519 U.S. 408, 414 (1997)). A similar societal expectation probably also exists regarding a resident's obligation to respond to a police officer who knocks on the front door, displays his badge, and requests the resident to step outside to speak with him.

have to submit to the official request. While that right is implicit under *Bostick*, *supra*,[30] this Court has never expressly held that the people possess these rights. Even without consideration of the estimated 37 plus million immigrants in the United States, there is a definite need for clarification from the Court.

2. The Opinion Of The Court Of Appeals Conflicts With Prior Pronouncements Of This Court And Of The Court Of Appeals.

Fernandes asserted in the district court and in the court of appeals that his compliance with Walker's request to step outside and speak with them, in response to his identification as a police officer and the display of his badge, 1ER22, 57-58, was a submission to a "show of authority" under this Court's prior opinions, including *Brower v. County of*

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[30] In *Berkemer v. McCarty*, 468 U.S. 420 at 439 (1984), the Court noted, without any citation of authority, that persons stopped under *Terry v. Ohio*, 392 U.S. 1 (1968), on the basis of "reasonable suspicion" are not obligated to answer questions posed to them by the police. Of course, in the post 9/11 world, most people are afraid not to answer questions posed to them by law enforcement authorities, whether that be on the street, the airport, the bus terminal or even at their own front door. Given Fernandes' Indian citizenship and presence in the United States as a student, that fear would logically be greater than that of a United States citizen.

Inyo, 489 U.S. 593, 597-98 (1989),[31] and *Kaupp v. Texas*, 538 U.S. 626 (2003).[32] Fernandes also relied upon *California v. Hodari D.*, 499 U.S. 621, 625 (1991), to support his position that Walker's action in putting his arm around Fernandes before Fernandes went down the stairs constituted a "constructive detention" and hence a "seizure."[33] Fernandes also

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[31] In *Brower*, the decedent was chased by police cars with flashing lights for almost 20 miles. The decedent did not submit to this "show of authority," and the road was blocked by the police. Only by running into the roadblock was the decedent actually stopped. The Court held that during the chase, there was no "seizure" because there was no governmental termination of freedom of movement through means intentionally applied, but concluded such a seizure occurred when the decedent's vehicle collided with the roadblock.

[32] In *Kaupp*, officers were admitted to the residence by Kaupp's father at 3:00 a.m. The officers woke Kaupp up in his bed, told him "we need to go and talk," to which the defendant stated "okay," and then transported him to the police station. *Id.* at 631-632. The Court held that the officers' "we need to go and talk" statement presented no option but "to go" and that the defendant's "okay" was nothing but a "mere submission to a claim of lawful authority." *Id.* at 631 (citing *Florida v. Royer*, 460 U.S. 491 at 497 (1983), and *Schneckloth v. Bustamonte*, *supra*, at 226). The Court also noted that "[t]he State points to nothing in the record indicating Kaupp was told that he was free to decline to go with the officers." *Id.* at 628.

[33] Hodari ran from an approaching police car and as officers, suspicious of his flight, chased him, he tossed away drugs. In resolving the issue of whether Hodari had been seized, the Court discussed the concept of a "constructive detention," which is accomplished by a mere touching, however slightly, of the body. 499 U.S., at 625. The Court went on to hold that "[a]n arrest requires either physical force or, where that is absent, submission to the assertion of authority." 499 U.S., at 626.

relied upon prior cases from the court of appeals, including *United States v. Kohler*, 836 F.2d 885 (5th Cir. 1988) and *United States v. Almand*, 565 F.2d 927 (5th Cir.), *cert. denied*, 439 U.S. 824, 99 S.Ct. 92, 58 L.Ed.2d 116 (1978), to demonstrate that Fernandes was "stopped" and "seized" at his front door.[34]

The court of appeals did not even mention the uncontested testimony that Walker displayed his badge when he identified himself, or address Fernandes' reliance upon any of the cases cited above. Instead, the court of appeals held that Fernandes was not "seized" because this was merely a "consensual" "knock and talk," with the court of appeals adding that "any physical contact did not constitute a show of authority or physical restraint." App. 9.

The court of appeals' conclusion that Fernandes was not "seized" conflicts with this Court's opinions in *Brower*, *Kaupp*, and *Hodari D.* It also conflicts with its own prior opinions in *Kohler* and *Almand*. Certiorari should be granted to address the issue of whether a person is "seized" under the Fourth Amendment when the police conduct a "knock and talk" at the front door of a person's "castle" so that these opinions

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[34] In *Kohler*, the Fifth Circuit stated that "[t]he stop occurred when the agent dressed in plain clothes knocked on the door (of the motor home) and identified himself as a border patrol officer." (explanation added). *Kohler*, *supra*, at 888. In *Almand*, the seizure occurred when Almand opened the door of the camper and stepped out in response to officer's knocking on door. *Almand*, *supra*, at 929.

can be reconciled and clear guidance provided to appellate courts throughout the state and federal systems.

3. The Courts Of Appeals Are Not Unanimous Regarding The Legality Of The "Knock And Talk" Investigative Procedure.

The courts of appeals which have addressed utilization of the "knock and talk" investigative procedure have generally approved it, although there appears to be some tension between them and subtle differences in the analysis employed.[35]

Over fifty years ago, the Ninth Circuit held that law enforcement officers are "perfectly entitled to knock, openly and peaceably, on a person's door with the honest intent of asking him questions." *Davis v. United States*, 327 F.2d 301, 303 (9th Cir. 1964). That opinion has led the Ninth Circuit to the conclusion that "no suspicion at all is needed for agents to conduct a 'knock and talk,' even one occurring at night." *United States v. Cormier*, 220 F.3d 1103, 1109 (9th Cir. 2002), *cert. denied*, 531 U.S. 1174, 121 S.Ct. 1146, 148 L.Ed.2d 1009 (2001).

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[35] Fernandes has been unable to locate cases reflecting that the First Circuit or the District of Columbia Circuit have addressed the "knock and talk" investigative technique.

The Second Circuit has relied upon on an investigatory stop analysis to conclude it was reasonable for officers to order occupants to step outside for a limited investigation. *United States v. Gori*, 230 F.3d 44, 54-57 (2d Cir. 2000). The Third Circuit has recognized the "knock and talk", but has not expressly approved and relied upon it. *United States v. Cole*, 437 F.3d 361, 370 (3d Cir. 2006) ("contrary to the government's characterization, this case does not present the situation where the police reasonably attempted to utilize the 'knock and talk' procedure"); *Estate of Smith v. Marasco*, 318 F.3d 497, 519 (3d Cir. 2003) (discussing cases from other circuits). The Fourth Circuit has held that, ordinarily, no Fourth Amendment violation occurs when the police "knock on a residence's door or otherwise approach the resident seeking to speak to the inhabitants." *Rogers v. Pendleton*, 249 F.3d 279, 289 (4th Cir. 2001). The Sixth Circuit has overwhelmingly approved "knock and talk" investigations. *United States v. Thomas*, 430 F.3d 274, 277 (6th Cir. 2005); *United States v. Chambers*, 395 F.3d 563, 568 n. 2 (6th Cir. 2005); *Ewolski v. City of Brunswick*, 287 F.3d 492, 504-505 (6th Cir. 2002). The Seventh Circuit has also approved "knock and talk" investigations, *United States v. Jerez*, 108 F.3d 684, 689 (7th Cir. 1997); *United States v. Adeyeye*, 359 F.3d 457, 462 (7th Cir. 2004) (observing that the officers knocked only twice in the middle of the afternoon and stated at the time of the second knock that they could return later if it was an inconvenient time, and concluding that having been provided an alternative, there was no need to inquire

whether the officers had reasonable suspicion for an investigatory stop), as has the Eighth, Tenth and Eleventh Circuits. *United States v. Barker*, 437 F.3d 787, 790 (8th Cir. 2006) (concluding an investigatory stop analysis may apply when officer "requested" a defendant step outside his room without identifying himself as a police officer, as opposed to issuing a "command"); *United States v. Cruz-Mendez*, 467 F.3d 1260, 1264 (10th Cir. 2006) ("[A] 'knock and talk' is a consensual encounter and therefore does not contravene the Fourth Amendment, even absent reasonable suspicion."), *but see United States v. Portillo-Portillo*, No. 07-2070, 267 Fed. Appx. 760, 763, 2008 WL 538487, at *3 (10th Cir. Feb. 28, 2008) (unpublished) (applying an investigatory stop analysis to defendants who voluntarily opened the door to police); *United States v. Tobin*, 923 F.2d 1506, 1511 (11th Cir. 1991) (noting that "[r]easonable suspicion cannot justify the warrantless search of a house, but it can justify the agents' approaching the house to question the occupants"); *United States v. Taylor*, 458 F.3d 1201, 1204 (11th Cir. 2006).

On the other hand, the legitimacy of the "knock and talk" procedure has been questioned by at least two judges on the Fifth Circuit. In *United States v. Gould*, 364 F.3d 578, 595 (5th Cir. 2004) (*en banc*), Judge Smith, dissenting, stated that "[t]he majority puffs this court's assessment of the 'knock and talk' strategy, taking what was once 'not inherently unreasonable,' *United States v. Jones*, 239 F.3d 716, 720 (5th Cir. 2001), and making it something that has

'clearly been recognized as legitimate.' *Id.* at 590. That is quite a transformation in only three years time." Similarly, Judge DeMoss' dissenting opinion in *Gould*, *supra*, at 599, characterized the process as no longer a "knock and talk," but rather a "knock, enter, maybe talk, and search" tactic, all conducted without a warrant, thus constituting "an end-run around [] Fourth Amendment protections.").[36]

Similarly, Judge Evans in his concurring opinion in *United States v. Johnson*, 170 F.3d 708, 721 (7th Cir. 1999), noted the danger associated with the "knock and talk" investigative procedure by stating that the police "were taking a shortcut in the hope that something good (from a drug-busting perspective) would turn up. . . . As I see it, the seeds of this bad search were sown when the police decided to use the 'knock and talk' technique. And that process – which sounds more like a friendly visit to sell tickets to a police picnic than a perilous visit to a suspected drug hive – is fraught with danger, not to mention constitutional problems. . . ."

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[36] In *Jones*, 239 F.3d at 721, the Fifth Circuit stated "[b]ecause the officers were not convinced that criminal activity was taking place and did not have any reason to believe that the occupants were armed, the 'knock and talk' procedure was a reasonable investigative tactic under the circumstances." Of course, in Fernandes' case, the detectives had no "reasonable suspicion" and also had information that Fernandes "habitually" kept a gun, App. 19, so under *Jones*, a "knock and talk" would appear to be "unreasonable." However, the court of appeals did not address Fernandes' argument that under *Jones*, the "knock and talk" was unreasonable.

Because of the tension between the courts of appeals and valid concerns regarding the constitutionality of the "knock and talk" investigative procedure, certiorari should be granted.

4. The "Knock And Talk" Investigative Procedure Is "Unreasonable."

"[W]hen the police come on to private property to conduct an investigation or for some other legitimate purpose and restrict their movements to places visitors could be expected to go (e.g., walkways, driveways, porches), observations made from such vantage points are not covered by the Fourth Amendment." Wayne R. LaFave, 1 Search and Seizure: A Treatise on the Fourth Amendment § 2.3(f) (4th ed. 2008) (footnotes omitted). This rule supports the Court's analysis of the Fourth Amendment implications of cases dealing with the curtilage of a residence. *See United States v. Dunn*, 480 U.S. 294 (1987); *California v. Greenwood*, *supra*. At the same time, the Court must balance the inherent coercion that exists when the police knock on the front door. Everyone who has ever been pulled over by the police has experienced the anxiety and fear that results from seeing the flashing lights in the rear view mirror. Everyone who has ever been approached by the police, even in a public place, has experienced the anxiety that accompanies such an event. And when police officers appear at the front door of a residence,

the "imbalance of immediate power is unmistakable." *Drayton*, *supra*, at 210 (Souter, J., dissenting).

With the exception of Halloween, there undoubtedly is a societal expectation that uninvited and unexpected visitors will not disturb the sanctity of the front door. Given evolving societal expectations, it is entirely one thing for the police to knock on the front door of a person's "castle" and seek assistance regarding matters unrelated to the potential criminality of the resident, and quite another for the police to deliberately disturb the sanctity of the resident and trick the resident into speaking with them by misrepresenting the purpose of the visit and assuring the resident that if he complies with their requests, the police will "go away" without any negative ramifications. An approach to the front door of a person's "castle" designed to develop "reasonable suspicion," "probable cause" or otherwise obtaining consent or information to justify a warrantless entry into the residence is nothing more than a subterfuge designed to avoid the warrant requirement and offends the "core" protections of the Fourth Amendment. Indeed, far less intrusive means exist, including the use of normal investigative techniques or even calling the resident to ascertain whether the resident is willing to speak with the officers. There is no question that the home provides a special place in the Bill of Rights. Under the First Amendment, the "State has no business telling a man, sitting alone in his house, what books he may read or what films he may

watch." *Stanley v. Georgia*, 394 U.S. 557, 565 (1969).[37] Under the Second Amendment, the federal government cannot ban "handgun possession in the home." *District of Columbia v. Heller*, 554 U.S. ___, 128 S.Ct. 2783, 2822 (2008). Under the Third Amendment, the quartering of soldiers "in any house" is prohibited in time of peace "without the consent of the Owner." The core protections of the Fourth Amendment protect residents from being disturbed in the sanctity of their homes, and a reasonable person – and society at large – has an expectation that the police will not disturb the sanctity of their homes absent a compelling governmental interest. The intrusive and inherently coercive police investigative technique known as the "knock and talk" infringes upon the core of the Fourth Amendment and certiorari should be granted to address this issue of nationwide importance.

Additionally, the "knock and talk" procedure employed herein was tainted with affirmative misrepresentations by the detectives regarding why they wanted to talk to Fernandes, what they wanted to talked to him about, and what they wanted him to do. The detectives were not knocking on his front door, contrary to their representations to Fernandes, to

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[37] The Due Process Clause also prohibits the States from criminalizing consensual intimate sexual acts performed in the home because "[i]t is the promise of the Constitution that there is a realm of personal liberty which the government may not enter." *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (quoting *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 847 (1977)).

investigate a "complaint" that someone had smelled marijuana smoke. In fact, the detectives were not interested in resolving their admitted, fictitious "complaint," but rather were present to investigate Fernandes' alleged distribution of narcotics. Instead of telling Fernandes the truth – that they were there to investigate allegations made by a CI that he was selling marijuana and psychedelic mushrooms (and possessing a .45 caliber semiautomatic pistol) – the detectives affirmatively misrepresented the purpose of their visit and lulled Fernandes into believing that the "complaint" could be resolved and they would go away if he simply agreed to stop smoking marijuana and then, subsequently, to get rid of any "bongs." Because of these affirmative misrepresentations, this cannot be deemed a "consensual" encounter because "consent" obtained by deception is not lawful consent. *Florida v. Bostick*, *supra*, at 438 (1991); *SEC v. ESM Government Securities, Inc.*, 645 F.2d 310, 316 (5th Cir. 1981); *United States v. Bosse*, 898 F.2d 113, 115 (9th Cir. 1990). Indeed, just as consent to enter can be tainted by affirmative representations, an encounter initiated by law enforcement that is affirmatively misrepresented to the individual approached (in his residence, no less) by law enforcement is not consensual and violates the Fourth Amendment. Government officials should not "mislead suspects as to their purpose" because "people 'should be able to rely on [the] representations' of government officials." *United States v. Alverez-Tejeda*, *supra*, at 1017. "If people can't trust the representations of government

officials, the phrase 'I'm from the government and I'm here to help' will become even more terrifying." *Id.*

Certiorari is appropriate since Walker admitted he had no "reasonable suspicion" that Fernandes was dealing drugs before he went to the residence on January 31, 2007; Walker's approach to Fernandes' front door and his request to speak with Fernandes outside violated the sanctity of the home; there was no notification to Fernandes that he did not have to speak with the detectives or that he could tell them to leave his residence, 1TR57-58, and Walker made promises which, even if not sufficiently "direct" to render Fernandes' statements involuntary, nevertheless induced them.

5. The "Knock And Talk" Investigative Procedure Is Designed To Circumvent Fourth Amendment Rights, Necessitating Notification By The Officers That The Resident Need Not Talk To The Officers And Can Instruct The Officers To Leave.

In *Missouri v. Seibert*, 542 U.S. 600 (2004), the Court held that the deliberate use of a two-step interrogation strategy – where the officers questioned first and then gave *Miranda* warnings and then questioned again – was unconstitutional as designed solely to obtain a confession the suspect would not make if he understood his rights at the outset. *Id.* at 613. In the course of the plurality opinion, Justice Kennedy observed that a belated warning of the right

to remain silent "permits the accused to conclude that the right not to respond did not exist when the earlier incriminating statements were made." Justice Kennedy's statement supports the logical conclusion, consistent with Fernandes' own belief, that until a person is administered *Miranda* warnings, the person has no right to decline to speak with the police or tell them to leave the front door of his residence.[38] More importantly, however, is the realization that Justice Kennedy's statement highlights the need for this Court to grant review to clarify whether, like *Seibert*, the police can continue to utilize the "knock and talk" investigative procedure to attempt to circumvent the protections of the Fourth Amendment. Unless this Court clarifies that when the police knock at the front door of a residence, the officers must inform the resident that there is no obligation to cooperate,

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[38] The district court found Fernandes' assertion "that he did not know he could ask for a lawyer, refuse to answer questions, or refuse to consent to the detective's entry into his apartment" was not credible for purposes of the district court's *Miranda* analysis. App. 29-30, 54. However, the district court never made a credibility finding regarding Fernandes' testimony that he was unaware he could have told the detectives to leave his residence or refused to go outside when Walker first knocked on his door. It is contra-intuitive to conclude that Fernandes, who was smoking marijuana with his girlfriend when Walker knocked on the door and identified himself, would have stepped outside at Walker's request if in fact Fernandes knew he could have told the detectives to leave his residence and that he did not have to go outside to speak with them. Walker candidly admitted he did not notify Fernandes he did not have to speak with them and did not have to come outside of his residence. 1TR58.

answer questions or step outside the residence, the police will continue to utilize the "knock and talk" investigative procedure to circumvent the Fourth Amendment. While the rights embodied within *Miranda* occupy a "special place in the 'public's consciousness,'" *Dickerson v. United States*, 530 U.S. 428, 464-465 (2000) (Scalia, J., dissenting), the "public's consciousness" of its Fourth Amendment rights to refuse to cooperate with the police when they come knocking on the front door is non-existent.

PRAYER FOR RELIEF

For all of the foregoing reasons, the petition for writ of certiorari should be granted to review the opinion of the court of appeals and resolve these issues of nationwide importance.

Respectfully submitted,

DAVID L. BOTSFORD

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 07-51100

UNITED STATES OF AMERICA

Plaintiff-Appellee

v.

JASON JULES FERNANDES

Defendant-Appellant

Appeal from the United States District Court
for the Western District of Texas
USDC No. 1:07-CR-80-1

(Filed Jul. 10, 2008)

Before HIGGINBOTHAM, DAVIS, and BARKSDALE, Circuit Judges.

PER CURIAM:*

Having conditionally pleaded guilty to possession with intent to distribute LSD and to possession of a

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

firearm in furtherance of a drug-trafficking crime, Jason Jules Fernandes appeals the denial of his motion to suppress. Primarily at issue are whether: (1) Fernandes' encounter with Detectives was consensual, rather than a seizure under the Fourth Amendment; (2) Fernandes' incriminatory statements were voluntary; and (3) he consented to a Detective's entering his apartment. AFFIRMED.

I.

In January 2007, the Austin Police Department received a confidential tip that Fernandes, a University of Texas student, was selling marijuana and psychedelic mushrooms out of his apartment, and that he kept a firearm there. Detective Walker attempted to verify the tip but was only able to confirm that Fernandes lived at the address provided by the informant. (At the suppression hearing, Detective Walker testified that information provided by confidential informants is not automatically taken at face value because informants sometimes have an incentive to lie.)

Given the lack of corroboration of the confidential informant's tip, Detective Walker and his partner, Detective Bryant, decided to initiate a consensual encounter, more commonly referred to as a "knock-and-talk", on 31 January 2007 with Fernandes at his apartment. Both Detectives wore plain clothes, arrived in an unmarked car, and concealed their weapons. Detective Bryant waited at the bottom of the

stairs to Fernandes' residence, while Detective Walker climbed the stairs and, after activating a digital audio recorder, knocked on the door. (The recording lasts approximately 45 minutes. A partial transcript and an audio copy were introduced at the suppression hearing.)

When Fernandes answered the door, Detective Walker informed him that he and Detective Bryant were police officers and asked to speak with him outside. Fernandes complied, and accompanied Detective Walker down the stairs to the yard. He told the Detectives that his girlfriend was in the apartment. The Detectives told Fernandes they were responding to a complaint from a neighbor who had smelled marijuana coming from the apartment. Detective Walker told Fernandes:

> I don't want you to get in any trouble. That's not why I'm here. I'm here to respond to a complaint. . . . And if I can respond to this complaint and say I've spoke to Jason, and he gave me the bong, and I went away, then we're over with it, okay.

In reality, there had been no complaint by a neighbor; the Detectives wanted consensual access to Fernandes' apartment.

Detective Walker described Fernandes as being "completely cooperative" in the investigation. Fernandes readily led the Detectives to the garage, where Fernandes produced a bong. At this point, Detective Walker stated: "This is a pretty minor deal.

But what I'm concerned with is that we might be leaving anything illegal up in your apartment. Is [sic] there no other bongs up there because – ". Fernandes stated that he had already produced all of his bongs. Detective Bryant then persisted in trying to gain access to the upstairs apartment: "Where is your marijuana at [sic]? I know you've got at least a dime bag somewhere". Fernandes admitted he had marijuana in his apartment.

Fernandes offered to retrieve the marijuana, but the Detectives insisted that he *not* go in his apartment alone. Detective Bryant stated: "Here's our dilemma. We can't allow you to go in there and retrieve illegal narcotics without us going with you. And the reason for that is because that would put you in a situation where you would have to try and destroy them". Fernandes told the Detectives he had a couple of ounces of marijuana in a jar on the floor of his apartment; he then slipped inside the apartment to retrieve the jar.

At this point, Detective Walker asked: "Can I follow you inside just to grab it, Jason?" The audio recording and transcript do not provide Fernandes' response; however, Detective Walker testified at the suppression hearing that Fernandes mumbled, "yeah", or some similar affirmative statement. Detective Walker then followed Fernandes into the apartment, where Fernandes picked up a jar containing marijuana. Upon Fernandes' producing the marijuana, Detective Walker inquired whether there was additional contraband in the apartment. Fernandes

replied there was not. At this point, it is not clear how far into the apartment Detective Walker proceeded; he testified at the suppression hearing that he remained just inside the threshold of the apartment and outside the bedroom from which Fernandes retrieved the marijuana.

Fernandes and Detective Walker then went back downstairs, where the Detective explained: "When I walked in here to get that little bit of weed, I saw a money counter, I saw a digital scale, I saw baggies, I saw everything somebody needs to sell weed". He then asked for consent to search the apartment; Fernandes refused and requested an attorney.

Detective Bryant placed Fernandes under arrest and read him his *Miranda* rights. According to the annotated transcript of the encounter introduced by Fernandes, approximately 11 minutes elapsed between when the Detectives arrived at the apartment and Fernandes and his girlfriend were read their *Miranda* rights.

Detective Walker stepped into the apartment and took photographs of the scene to secure it before leaving to obtain a search warrant. Fernandes and his girlfriend Jackie were detained until a search team arrived. When the search warrant was executed, approximately $250,000 worth of marijuana was found, as well as 1200 doses of LSD and a Ruger .45 caliber semi-automatic pistol.

Fernandes moved in district court to suppress the evidence seized in his apartment, as well as his

incriminating statements to the Detectives. An evidentiary hearing was held on 29 May 2007, at which Detectives Walker and Bryant, as well as Fernandes, testified. As noted, the audio recording and partial transcript were introduced.

On 4 June, through a detailed 14-page order, that motion was denied. On 28 June, a motion to reconsider was denied through an even more detailed 26-page order. On 29 June, Fernandes entered a conditional plea of guilty, reserving his right to appeal the denial of his motion to suppress. He was sentenced, *inter alia,* to 147 months' imprisonment.

II.

In maintaining the district court erred in denying his motion to suppress, Fernandes claims the "knock-and-talk" strategy employed by the Detectives constituted an unlawful seizure under the Fourth Amendment. As a result, Fernandes maintains, both his incriminating statements and Detective Walker's entry into Fernandes' apartment were the fruits of that illegality. He also contends that his statements to the Detectives were not voluntary, and that he did not consent to the entry of his apartment.

In reviewing a ruling on a motion to suppress, the district court's legal conclusions are reviewed *de novo*; its factual findings, only for clear error, viewing the evidence in the light most favorable to the prevailing party. *United States v. Charles,* 469 F.3d 402, 405 (5th Cir. 2006), *cert denied,* 127 S. Ct. 1505

(2007). A factual finding by the district court is clearly erroneous only if, based on our review of the entire record, we are "left with the definite and firm conviction that a mistake has been committed". *Anderson v. Sch. Bd. of Madison County,* 517 F.3d 292, 296 (5th Cir. 2008) (citation and internal quotation marks omitted). "The panel may affirm the district court's decision on any basis established by the record." *Charles,* 469 F.3d at 405 (citing *United States v. Ibarra-Sanchez,* 199 F.3d 753, 758 (5th Cir. 1999)).

A.

Consensual encounters in which an individual voluntarily and willingly agrees to speak to the police are not seizures and may be initiated by the police without probable cause or reasonable suspicion. *Florida v. Bostick,* 501 U.S. 429, 434 (1991). In this regard, the Supreme Court has held that mere questioning of an individual by the police does not result in a seizure, "[s]o long as a reasonable person would feel free to disregard the police and go about his business". *Id.* (citation and internal quotation marks omitted). Our court has recognized the "knock-and-talk" strategy to constitute such a reasonable, non-custodial investigative tool. *United States v. Jones,* 239 F.3d 716, 720 (5th Cir. 2001); *see also United States v. Gould,* 364 F.3d 578, 590 (5th Cir. 2004) (en banc).

The district court found the initial interaction between Fernandes and the Detectives constituted a

consensual encounter. This is a finding of fact, subject to reversal only if it is clearly erroneous. *United States v. Gonzales,* 79 F.3d 413, 419 (5th Cir. 1996). Fernandes asserts that the "knock-and-talk" conducted by the Detectives was not a consensual encounter but rather an investigatory stop, under *Terry v. Ohio,* 392 U.S. 1 (1968), which was unconstitutionally conducted without reasonable suspicion.

For determining whether the encounter was a *Terry*-stop seizure, rather than a consensual encounter, we must determine objectively whether, based on the Detectives' conduct, a reasonable person would have believed he was free to refuse to speak with the Detectives. *Bostick,* 501 U.S. at 434. In making this determination, we consider the totality of the circumstances surrounding the incident from the perspective of an innocent person. *United States v. Chavez,* 281 F.3d 479, 483-84 (5th Cir. 2002).

The record reflects that the encounter outside Fernandes' apartment, where he made incriminating statements and produced his bong, was consensual. The Detectives knocked on Fernandes' door and asked if they could speak with him outside. No force or show of authority was made to gain Fernandes' compliance. The Detectives did not display their firearms and were not in uniform – which might signal a less-than-consensual encounter. In fact, at the suppression hearing, Detective Walker testified that the encounter was "one of the more casual and cooperative encounters that I have experienced". Moreover, during this initial questioning, Fernandes was not

physically or verbally restrained. On this point, however, Fernandes asserts that the fact that Detective Walker put his arm around Fernandes' shoulders when walking down the apartment stairs shows that Fernandes was in custody. The context of the encounter, however, indicates that any physical contact did not constitute a show of authority or physical restraint.

The district court's finding that Fernandes was engaging in a calculated "wait-and-see" approach – hoping his limited compliance would cause the Detectives to leave, so that his more serious illegal conduct would not be discovered – is supported by the record. These objective facts are confirmed by the fact that, at the suppression hearing, Fernandes admitted he voluntarily agreed to speak with the Detectives and answer questions.

Therefore, the finding that the encounter was consensual is *not* clearly erroneous. (In his reply brief, Fernandes, who is from India, contends that his rights under the Vienna Convention on Consular Relations were violated, and that such violation should militate against finding the encounter to be consensual. Because this contention was not raised in his opening brief, Fernandes has waived it. *E.g.*, *United States v. Pompa,* 434 F.3d 800, 806 n.4 (5th Cir. 2005).)

B.

Accordingly, next at issue is the district court's concluding Fernandes' statements to the Detectives – *i.e.*, the confession regarding possession of marijuana and bongs – were voluntary. "When a defendant challenges the voluntariness of a confession, the government must prove its voluntariness by a preponderance of the evidence in order for the confession to be admissible as substantive evidence at the defendant's criminal trial." *United States v. Garcia Abrego*, 141 F.3d 142, 170 (5th Cir. 1998) (citing *Self v. Collins*, 973 F.2d 1198, 1205 (5th Cir. 1992)). The district court's ultimate voluntariness determination is reviewed *de novo*; as noted, the underlying factual findings, only for clear error. *Id.*

The Government may satisfy its burden of proving voluntariness if it demonstrates that, "under the totality of the circumstances, the statement is the product of the accused's free and rational choice". *United States v. Broussard*, 80 F.3d 1025, 1033 (5th Cir. 1996). The focus of our voluntariness inquiry must be on the Detectives' actions; indeed, "coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment". *Colorado v. Connelly*, 479 U.S. 157, 167 (1986). Moreover, that coercive conduct must cause the confession. *Id.* at 164.

Fernandes contends the Detectives extracted his incriminatory statements by making promises that

the incident would be "over with" if he produced his bong. It is true that certain direct or implied promises of leniency may be "so attractive they render a resulting confession involuntary" if the promise is not kept. *Streetman v. Lynaugh,* 812 F.2d 950, 957 (5th Cir. 1987). In *Bram v. United States,* the Supreme Court held that, for a confession to be voluntary, it may not be "extracted by any sort of threats or violence, or obtained by *any direct or implied promises,* however slight". 168 U.S. 532, 542-43 (1897) (emphasis added).

The Court, however, has retreated from a strict application of this position, holding that *Bram* does not state the standard for voluntariness. *Arizona v. Fulminante,* 499 U.S. 279, 285-86 (1991). Instead, voluntariness must be determined based on the totality of the circumstances. *Id.* In that regard, the existence of a promise constitutes but one factor in that determination and does *not* render a confession involuntary *per se. Hawkins v. Lynaugh,* 844 F.2d 1132, 1140 (5th Cir. 1988).

The district court did not clearly err in finding the record does not reflect that the Detectives made any explicit promises of leniency to Fernandes. The only statement approaching a promise of leniency was Detective Walker's following statement: "And if I can respond to this complaint and say I've spoken with Jason, and he gave me the bong, and I went away, then we're over with it, okay". As found by the district court, this statement, however, was likely true when made. Had the only incriminating evidence uncovered been the bong, the Detectives could have

terminated the consensual encounter without any arrest or citation. Along that line, Detective Walker testified that, had Fernandes consented to a search of his apartment and only a small amount of marijuana had been discovered, he would have called his supervisor and recommended no arrest be made.

Regardless, this statement was "at most an implication of leniency, and indirect promises do not have the potency of direct promises". *Id.* (citation and internal quotation marks omitted). This statement did not, when viewed in context of the entire encounter, render Fernandes' statements involuntary. Therefore, the district court correctly concluded this statement was merely a prediction of future events, rather than an explicit promise.

Fernandes maintains, however, that his dyslexia should factor into the voluntariness analysis; he contends this disorder made him perceive the Detectives statements literally, which caused him to understand Detective Walker's statement as an explicit promise of leniency. The district court properly discounted evidence of Fernandes' dyslexia presented in connection with his motion for reconsideration. Although Fernandes testified at the suppression hearing that he was dyslexic, he presented no evidence of his learning disability at that time. Rather, in seeking reconsideration, he attached documents from a website on dyslexia, reports from schools he had attended in India, and letters granting him special accommodation for the SAT and at the University of Texas.

The district court found the documents largely consisted of inadmissible hearsay, were unauthenticated, and were irrelevant to Fernandes' understanding of the Detectives' statements during the "knock-and-talk". The court then concluded that, even taking Fernandes' disability into account, the totality of the circumstances still weighed in favor of finding his statements to be voluntary. For the same reasons, we hold that Fernandes' dyslexia has no impact on our determining that his statements were voluntarily made.

Moreover, the Detectives' misrepresenting their reasons for being at Fernandes' apartment is of no moment. Our court has held that "trickery or deceit is only prohibited to the extent that it deprives the defendant of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them". *United States v. Bell,* 367 F.3d 452, 461 (5th Cir. 2004) (citing *Soffar v. Cockrell,* 300 F.3d 588, 596 (5th Cir. 2002) (en banc)). It is clear that the deception by the Detectives as to their intentions did not impact the voluntariness of Fernandes' statements. While the Detectives did manufacture a complaint by a neighbor as their justification for being at the apartment, Fernandes knew at all times that the Detectives were present at his apartment because they suspected he was in possession of illegal drugs. In sum, the misrepresentations were not sufficiently egregious to overcome Fernandes' will so as to render his confession involuntary.

C.

Fernandes also contends Detective Walker unlawfully searched his apartment. The district court found that Fernandes either expressly or impliedly consented to the search. In the alternative, the court found the search was justified by exigent circumstances. Fernandes maintains consent was not given voluntarily.

Detective Walker entered the apartment (at a minimum, at the threshold, as discussed *supra*) when Fernandes suddenly slipped into it to retrieve the drugs. As discussed, when this occurred, Detective Walker asked: "Can I follow you inside just to grab [the marijuana], Jason?" At this point, the facts were disputed in district court. As discussed *supra,* Detective Walker testified that Fernandes responded to his question by mumbling "yeah". As noted, this portion of the audio recording of the encounter is inaudible, however, and Fernandes disputed Detective Walker's account. The district court noted Fernandes' consent to search *vel non* "was essentially a 'swearing match' between the Defendant and Detective Walker". The court found Detective Walker's testimony credible, and Fernandes' consent voluntary.

It is well-established that the warrantless "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed" and that such searches are presumptively unreasonable. *Payton v. New York,* 445 U.S. 573, 585-86 (1980). Consensual searches, however, serve as an

exception to the warrant requirement so long as the consent is free and voluntary. *United States v. Mata*, 517 F.3d 279, 290 (5th Cir. 2008). Unlike our review of the district court's ruling on the voluntariness of Fernandes' confession, whether Fernandes voluntarily consented to a warrantless search of his apartment is a question of fact, reviewed only for clear error. *Id.* at 284. Where, as here, the district court bases its voluntariness finding on oral testimony at a suppression hearing, such fact-findings are particularly strong. *Id.* at 290.

While recognizing this standard of review, Fernandes nevertheless contends we should apply *de novo* review, claiming the district court based its factual findings on the audio recording, or the transcript, rather than testimony. Tellingly, Fernandes cites to no authority for this proposition. In civil cases, the clearly erroneous standard applies to findings of fact based on both "oral and other evidence". FED. R. CIV. P. 52(a)(6). Though no comparable rule of criminal procedure exists, we can think of no reason why the same should not hold true.

Consent-to-search voluntariness is determined by a six-factor, totality-of-the-circumstances analysis. *Mata*, 517 F.3d at 290. The factors are:

> (1) the voluntariness of the defendant's custodial status; (2) the presence of coercive police procedures; (3) the extent and level of the defendant's cooperation with the police; (4) the defendant's awareness of his right to refuse to consent; (5) the defendant's

> education and intelligence; and (6) the defendant's belief that no incriminating evidence will be found.

Id. The district court made findings with respect to each of these factors and concluded that they weighed, in balance, in favor of the consent to search being given voluntarily.

First, the district court found Fernandes was not in custody when consent was given. Second, it found no coercive tactics were used; rather, the Detectives "talked to the defendant without restraints, at his own residence, in an area open to public view". Third, the court found Fernandes cooperated by coming outside to talk to the police, apologizing for smoking marijuana, and giving the police several bongs. Fourth, the court discredited Fernandes' statement at the suppression hearing that he did not know he could refuse consent because he requested an attorney and refused to cooperate as soon as he knew he "could be in trouble today" and before he was read his *Miranda* rights. Fifth, the court found Fernandes to be a "highly-educated and intelligent individual", who understood the Detectives' instructions not to enter the apartment. Sixth, and finally, the court found Fernandes gave the Detectives his bong and marijuana in the mistaken belief that such cooperation would prevent the discovery of his larger drug-trafficking operation.

The district court applied the proper legal standard in determining voluntariness. Its factual findings with respect to that standard are, on balance, supported by the record, and, accordingly, are not clearly erroneous. (Because we affirm the district court's finding that consent to search was given voluntarily, we need not address the district court's alternative holding that exigent circumstances justified the search.)

III.

For the foregoing reasons, the judgment is AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

UNITED STATES OF AMERICA

-vs-

JASON JULES FERNANDES

CAUSE NO. A-07-CR-080-SS

ORDER

(Filed Jun. 5, 2007)

BE IT REMEMBERED on the 4th day of June 2007, the Court held a hearing in the above-styled cause. The Defendant, Jason Jules Fernandes, appeared and the parties were represented by counsel. Before the Court were Fernandes' Motion to Suppress [#15], Amended Motion to Suppress [#16] and the United States' response thereto [#21]. Having reviewed these documents, the evidence and arguments of counsel presented at the hearing, the applicable law, and the case file as a whole, the Court DENIES the Motion to Suppress for the reasons that follow.

Factual Findings

Detective Jon Walker received an anonymous tip from a self-described former customer of the Defendant, stating Defendant was selling marjijuana and pyschadelic mushrooms from his home. The informant provided Defendant's telephone number, address, and the make and color of the car normally

parked outside the residence (a maroon Saturn). The informant also advised Detective Walker that Defendant habitually kept a gun in the residence. Detective Walker confirmed via a search of the City of Austin utilities records that Defendant had a utilities account at the address given by the informant and a listed phone number matching the one given by the informant.

On January 31, 2007, Detective Walker and Detective Jason Bryant went to Defendant's residence and noted a maroon Saturn parked outside. Detective Walker activated a digital audio tape recorder and knocked on the door of the residence. Defendant has provided a partial transcript of the tape recorded conversation that followed. The United States has provided an audio copy of the recording. The recording captured the following events.

Defendant answered the door and Detective Walker explained the two men were police officers and they wanted to speak with him "outside for a minute." Defendant complied. Detective Walker asked Defendant "Could we talk to you downstairs for a minute?" The Defendant voluntarily agreed. Actually, the Defendant was relieved to go downstairs, as he knew his girlfriend, Jackie, was smoking a blunt inside at the time, and the Defendant had just taken a few pulls himself. The detectives told Defendant to go downstairs ahead of Detective Walker, which Defendant did. Defendant asserts he was "sandwiched" between Detective Walker and Detective Bryant, who had remained at the bottom of the stairs.

On the way, the detectives asked if anyone else was in the house, and Defendant explained that his girlfriend, Jackie, was there. The detectives did not attempt to speak to Jackie at this time.

Once downstairs, Detective Walker informed Defendant the detectives were responding to a complaint from a neighbor who had smelled marijuana smoke coming from the apartment. Detective Walker told Defendant "I don't want you to get in any trouble. That's not why I'm here. I'm here to respond to a complaint." He further told Defendant "if I can respond to this complaint and say I've spoken to Jason, and he gave me the bong, and I went away, then we're over with it, okay." In response, Defendant voluntarily gave Detective Walker a bong located in the garage. Detective Walker then stated "This is a pretty minor deal. But what I'm concerned with is that we might be leaving anything illegal up in your apartment." Defendant told him there were no other bongs or pipes in the apartment. Detective Bryant asked "Where is your marijuana at? I know you've got at least a dime bag somewhere." Defendant voluntarily admitted he had marijuana in the apartment.

Detective Walker suggested they should go together into the apartment to retrieve the drugs. Defendant asked "Can I – can I just go inside on my own?" and Detective Walker explained "Well, I would prefer that we did this all kind of consensually as opposed to me having to invoke any kind of authority. But if you want, we can just have your girlfriend come out, and we can all wait outside." Defendant

asked his girlfriend to leave the apartment and join them on the steps, which she did. Defendant began to enter the apartment, saying "I'll – I'll be right upstairs," but both Detective Walker and Detective Bryant told him not to enter the apartment alone. Detective Bryant in particular explicitly said "Don't – don't go in there without him [Detective Walker]." The Defendant was standing right at the door of the apartment and maybe a foot or two inside the threshold. At this time, Detective Walker said, "Why don't you come out now, Jason."

Detective Bryant then explained "Here's our dilemma. We can't allow you to go in there and retrieve illegal narcotics without us going with you. And the reason for that is because that would put you in a situation where you would have to try and destroy them." Defendant responded "Oh, no. I was just saying (Are you there?) Go in, Tony." (Tony is Defendant's cat). Defendant then told the detectives he had a few ounces of weed in ajar on the floor. Notwithstanding the Detectives' clear statement that he would not be allowed to enter unaccompanied, Defendant then slipped quickly inside to get the jar. Defendant testified he was hoping to move quickly enough to retrieve the jar and get back outside before the detectives could follow him.

As Defendant entered the apartment, Detective Walker said "Can I follow you inside just to grab it, Jason?" The transcript does not reflect any intelligible response from Defendant, but Detective Walker asserts the Defendant mumbled "yeah" too quietly to

be picked up by the tape. Regardless, Detective Walker followed Defendant a few feet into the apartment in order to keep him in sight, as he had previously explained he would have to do. Detective Walker testified he was concerned the Defendant might destroy or hide evidence, or retrieve the firearm reported by the confidential informant.

The Defendant picked up ajar containing marijuana within sight of Detective Walker, who was standing just inside the front door in order to keep the Defendant in view. When Defendant produced the jar of marijuana, Detective Walker then asked him if the jar was the only contraband in the apartment "[b]ecause we heard that there could be [more]. And all I want is to take it from you voluntarily." Defendant responded "No sir, that's all I have." The next few lines of the transcript are reported as "inaudible." It is unclear from the transcript whether the Detective moved into the apartment or whether he and Defendant remained by the door. Detective Walker asserts he remained just inside the threshold of the apartment. Within a few moments, Detective Walker told Defendant to go back downstairs. Detective Walker then explained to the Defendant and his girlfriend that "When I walked in here to get that little bit of weed, I saw a money counter, I saw a digital scale, I saw baggies, I saw everything somebody needs to sell weed." He asked Defendant for consent to search the apartment, and advised Defendant he had the right to refuse consent. Defendant did refuse consent and also requested an attorney.

At this point, Detective Bryant placed Defendant under arrest and read both Defendant and Jackie their *Miranda* rights. Detective Walker also stepped back inside the apartment (to the same spot he had been before when following the defendant) and took photographs of the scene to secure it before leaving to get a search warrant. Detective Bryant detained Defendant and Jackie until the search team arrived. When the search warrant was executed, the detectives found approximately $25,000 worth of additional marijuana in a safe in the garage, approximately 1200 "hits" of LSD in the apartment, and the firearm.

Defendant now moves to suppress this evidence, his incriminating statements, and the items observed in "plain view" when Detective Walker followed him into the apartment. Defendant argues (1) his initial incriminating statements were made involuntarily because they were induced by unlawful promises and assurances made by Detective Walker; (2) Defendant's incriminating statements are inadmissible because they are the product of a custodial investigation without benefit of *Miranda* warnings (3) Detective Walker's initial "plain view" sweep of the house was unlawful because he did not have consent to enter the house; and (4) the search warrant is invalid because it is premised on the incriminating statements and items in "plain view," and both of these grounds are faulty as described above.

Discussion

Defendant argues that his incriminating statements recorded during the January 31, 2007 conversation with Detective Walker were involuntary because he made them in response to the Detective's "promise that if Defendant turned over his bong and marijuana, the matter would be over. In support of this contention, Defendant points out the Detective's statements:

- "I don't want you to get in any trouble. That's not why I'm here. I'm here to respond to a complaint."
- "And if I can respond to this complaint and say I've spoken to Jason, and he gave me the bong, and I went away, then we're over with it, okay."
- "This is a pretty minor deal. But what I'm concerned with is that we might be leaving anything illegal up in your apartment."

Defendant contends these statements, which "lulled" him into "believing that if he . . . retrieved his bong(s) and handed them to the police, the matter would be over," amounted to an impermissible false promise of leniency. Am. Mot. Suppr. 11.

In *Bram v. United States,* the Supreme Court held a confession may not be "'extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight.'" 168 U.S. 532, 542-43 (1897) (quoting 3 RUSSELL ON CRIMES 478 (6th ed.)). Later cases, however, have clarified there is no bright-line rule regarding whether or not a promise or

implied promise is impermissibly coercive. *See, e.g. Hutto v. Ross,* 429 U.S. 28, 30 (1976) (per curiam). Instead, the voluntariness of a confession must be evaluated based on the totality of the circumstances. *Id.*

Certain promises, such as a promise of immunity or leniency, can be "so attractive they render a resulting confession involuntary" if the promise is not kept. *Streetman v. Lynaugh,* 812 F.2d 950, 957 (5th Cir. 1987). A false promise of leniency, however, should not be confused with a simple expression of sympathy or an attempt to create a rapport with the defendant. *United States v. Rojas-Martinez,* 968 F.2d 415, 418 (5th Cir. 1992); *Hawkins v. Lynaugh,* 844 F.2d 1132, 1139 (5th Cir. 1988). Nor should an officer's "truthful and noncoercive statement of the possible penalties which an accused faces" be considered a promise or threat of any particular outcome. *United States v. Ballard,* 586 F.2d 1060, 1063 (5th Cir. 1978). "A promise is not the same thing as prediction about future events beyond the parties' control. . . ." *Hawkins,* 844 F.2d at 1139. Rather, a promise must concern "a benefit that, in [the defendant's] eyes, [the officer] had the power to either grant or withhold." *Id.*

The statements made by Detective Walker in this case cannot be construed as an explicit promise of leniency. Detective Walker's statements were simply a permissible means of lowering Defendant's guard by "convincing [the defendant] that [Walker] was sympathetic, no matter what the state's reaction might be." *Id.* Detective Walker's statement "And if I can respond

to this complaint and say I've spoken to Jason, and he gave me the bong, and I went away, then we're over with it, okay," could be considered "at most an implication of leniency, and 'indirect promises do not have the potency of direct promises.'" *Id.* (internal citations omitted). Furthermore, at the time Detective Walker made that statement, it was likely true: he had not yet found any drugs or evidence of drug trafficking, and the mere possession of a bong would have been at most a misdemeanor (Tex. Health & Safety Code 481.125(a)). *See United States v. Rojas-Martinez,* 968 F.2d 415, 418 (5th Cir. 1992) (it was not a coercive illusory promise to suggest defendants would be deported rather than criminally prosecuted because, at the time the suggestion was made, no drugs had been found and deportation was a realistic possibility). In fact, Detective Walker testified that if Defendant had consented to a search of the apartment and only a small amount of marijuana consistent with personal use had been found, Detective Walker would have called his supervisor and recommended no arrest as he had done in similar circumstances in the past. In this context, Detective Walker's suggestion that giving up the bong would end the matter was not a promise but a prediction of future events. *Id.*

Defendant next argues this conversation amounted to a custodial interrogation and his confession was involuntary because it was given without *Miranda* warnings. In determining whether an individual was in custody, a court must examine all of

the circumstances surrounding the interrogation, but "the ultimate inquiry is simply whether there [was] a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." *Stansbury v. California,* 511 U.S. 318, 322 (1994) (quoting *California v. Beheler,* 463 U.S. 1121, 1125 (1983) (per curiam)).

Courts have explicitly recognized the "knock and talk" strategy as "a noncustodial procedure whereby an officer identifies himself and asks to talk to the home occupant and then eventually requests permission to search the residence, as a reasonable investigative tool when officers seek to gain an occupant's consent to search or when officers reasonably suspect criminal activity." *United States v. Berry,* 468 F. Supp. 2d 870, 880 (N.D. Tex. 2006) (citing *United States v. Jones,* 239 F.3d 716, 720 (5th Cir. 2001)); *see also United States v. Zertuche-Tobias,* 953 F. Supp. 803, 829 (S.D. Tex. 1996)). A "knock and talk" may, of course, escalate into a custodial interrogation. There are three general types of encounters between police and individuals: First, there is a "consensual encounter, which may be initiated by police without any objective level of suspicion, in which the individual willingly agrees to speak to police. Without more, a consensual encounter does not amount to a Fourth Amendment "seizure." *Florida v. Bostick,* 501 U.S. 429, 435 (1991). Second, there is a "limited investigative stop," permissible under *Terry v. Ohio* if there is a "reasonable suspicion" that a person has committed or is about to commit a crime. *Id.* Third, there is an

arrest, which must be based upon probable cause and justifies a "warrantless full-blown body search." *Id.*

In determining whether or not a seizure has occurred for purposes of the Fourth Amendment, the Court must examine, in light of the totality of the circumstances, whether or not a reasonable person would have believed he or she was free to leave or to refuse to consent to the search the officers have requested. *See id.* at 437; *United States v. Gonzales,* 79 F.3d 413, 420 (5th Cir.1996). The test is an objective one that looks to the police officer's conduct at issue and the setting in which it occurs. *Michigan v. Chesternut,* 486 U.S. 567, 573-74 (1988). This objective analysis, focusing on the officers and the setting, allows the law enforcement officers to determine in advance whether their contemplated conduct will violate the Fourth Amendment. *Id.* Furthermore, the "reasonable person" test presupposes an innocent person. *Bostick,* 501 U.S. at 438.

The record before the court establishes that Defendant was not in custody at the time he made the incriminating statements or at the time Detective Walker followed him into the house and observed the drug trafficking paraphernalia. The "knock and talk" itself was noncustodial; the Detectives did not threaten Defendant, and they questioned him in an open, semi-public area. *See Zertuche-Tobias,* 953 F. Supp. at 831; *Berkemer v. McCarty,* 468 U.S. 420, 439 (1984). The interview was entirely consensual – two police officers knocked on Defendant's door and asked if he would come downstairs and answer questions;

Defendant complied. At no time prior to discovering the trafficking paraphernalia inside the apartment did the detectives formally arrest Defendant, nor was he physically or verbally restrained during the questioning in the garage. The officers did not approach with lights and sirens or attempt to intimidate Defendant. The officers were not in uniform and did not display their firearms or otherwise threaten the Defendant in any way. The Defendant was not only at his home, rather than in a station house, but was also questioned in an area that was outdoors and open to public view.

Defendant argues, once he turned over his bong to the detectives, they had probable cause to arrest him and he reasonably believed he was not free to go, thereby changing the character of the questioning into a custodial investigation. To the extent Defendant is arguing that, once probable cause has been established, the Constitution requires that defendant be told he is free to leave before his consent to the police's request to search or to question is recognized as voluntary, the Supreme Court has consistently refused to require such an affirmative statement by the officers. *See Ohio v. Robinette,* 519 U.S. 33, 39-40 (1996); *Chesternut,* 486 U.S. at 574-76. Moreover, proof the suspect had knowledge of a right to refuse is not required for effective consent to a search or questioning. *Schneckloth v. Bustamonte,* 412 U.S. 218, 231-32, 248-49 (1973); *Gonzales,* 79 F.3d at 421 (while government did not inform defendants that they need not consent, "there is no absolute requirement that

the government establish that [defendants] knew they could refuse; it is merely one of the factors"). Finally, Defendant's assertion that he did not know he could ask for a lawyer, refuse to answer questions, or refuse to consent to the detectives' entry into his apartment is not credible in light of his request for an attorney and his unequivocal refusal of consent to further search of the apartment after Detective Walker explained that he "might be in trouble today." Defendant asserted these rights before he was given *Miranda* warnings. Defendant knew his rights and invoked them as soon as he realized he could be in serious trouble. His calculated decision to "wait and see" instead of invoking his *Miranda* rights earlier does not change the cooperative, consensual nature of the interview into a custodial one. Detaining Defendant and his girlfriend outside the apartment, moreover, did not turn the incident into a custodial interrogation; it merely escalated to the level of a "limited investigative stop," permissible under *Terry v. Ohio* if there is a "reasonable suspicion" that a person has committed or is about to commit a crime. *Bostick,* 501 U.S. at 435.

Defendant argues even if his incriminating statements are admissible, Detective Walker's entry into the apartment was invalid because Defendant never gave consent. The Court initially notes that, even if the Detective's entry was unauthorized, it came after Defendant had already voluntarily established probable cause for a search of the apartment through his own statements that he had marijuana in

the apartment and his production of the bong. At this point in the interview, if the Defendant had unequivocally refused permission to accompany him into the apartment, the Detectives could have done exactly what they did when the Defendant later refused to consent to a search of the apartment: detained him outside, obtained a search warrant based on his prior admissions, and lawfully entered the apartment to discover the very same evidence. "If the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means . . . the evidence should be received. Anything less would reject logic, experience, and common sense." *Nix v. Williams,* 467 U.S. 431, 444 (1984).

There is no need to rely on the "inevitable discovery" doctrine, however, because the record establishes Detective Walker lawfully entered the apartment. It is true the issue of Defendant's consent in this matter is essentially a "swearing match between the Defendant and Detective Walker. Detective Walker asserts that, when he asked "Can I follow you inside just to grab it, Jason?", the Defendant mumbled "yeah" in an inaudible portion of the tape. Defendant says he never gave verbal consent, and any impression of consent was merely acquiescence to the Detective's show of authority.

The Court finds Detective Walker's testimony credible. Both Detective Walker and Detective Bryant had clearly advised Defendant that he could not reenter the house unaccompanied, although he could

wait outside until the Detectives obtained proper authority to enter. There is no evidence on this record that the Detective used his authority to coerce or trick Defendant into allowing him into the house; he told Defendant what the reasonable alternative was. Given Defendant's apparent intelligence and his cooperation up to that point, the Detective reasonably believed Defendant's mumbled response, given as Defendant was entering the apartment, indicated consent.

Both Defendant and the Detectives agree that the Defendant did not verbally or physically refuse Detective Walker permission to enter the apartment. The Court finds the Defendant expressly agreed Detective Walker could accompany him. Even if Defendant's unintelligible utterance was not "sure" or "ok" or any other form of assent, he impliedly authorized Detective Walker's entry by going into the apartment immediately after being advised that would have to be accompanied by a detective and could not go inside alone.

In any event, under these circumstances Detective Walker was authorized to follow the Defendant into the residence whether he consented or not, in order to prevent the destruction of evidence and provide for officer safety. *See United States v. Vasquez,* 953 F.2d 176, 180 (5th Cir. 1992). Although a warrantless entry of a residence without consent is presumptively unreasonable, the presence of exigent circumstances can be an exception to these requirements. *Id.* To determine if exigent circumstances

exist, some factors a court examines include: (1) the degree of urgency involved and amount of time necessary to obtain a warrant; (2) a reasonable belief that contraband is about to be removed; (3) the possibility of danger to police officers guarding the site of contraband while a search warrant is sought; (4) information indicating the contraband's possessors know police are on their trail; and (5) the ready destructibility of the contraband. *Id.*, citing *United States v. Thompson,* 700 F.2d 944, 948 (5th Cir.), affirmed on appeal after remand, 720 F.2d 385 (5th Cir. 1983) (listing facts that may be relevant to finding of existence of exigent circumstances) (citation omitted); *United States v. Capote-Capote,* 946 F.2d 1100, 1103 (5th Cir. 1991) (listing frequently cited examples of exigent circumstances that may justify warrantless entry) (citation omitted). "The essential question in determining whether exigent circumstances justified a warrantless entry is whether law enforcement agents were confronted by an 'urgent need' to render aid or take action." *Id.* (citing *United States v. MacDonald,* 916 F.2d 766, 770 (2d Cir. 1990)).

In this case, the Defendant knew the police were "on his trail;" he had already admitted to possession of "some" marijuana. The officers had already expressed to the Defendant their reasonable belief that Defendant would seek to minimize his criminal liability by bringing out a small portion of his stash and concealing the rest (as he in fact sought to do). Detectives further reasonably believed Defendant's unaccompanied reentry into the apartment posed a

threat to officer safety – Detective Walker testified that the confidential informant had told him Defendant possessed a firearm. Despite Defendant's apparent cooperation up to this point, allowing him to reenter the apartment unaccompanied posed unacceptable risks. Thus, exigent circumstances existed that justified Detective Walker's following the Defendant into the residence even without Defendant's consent.

Moreover, the Detective did not himself "create[ ] exigent circumstances to subvert the Fourth Amendment's warrant requirements." *See Webster,* 750 F.2d at 327 (discussing manufacturing of exigency); *Thompson,* 700 F.2d at 950 (discussing the creation of exigent circumstances). On the contrary, Detectives Walker and Bryant each explained to the Defendant that he could not enter the apartment unaccompanied, and that his alternatives were to allow a detective to accompany him or to wait outside until the Detectives got a warrant. The Defendant himself created the exigent circumstances justifying Detective Walker's entry when he, immediately after receiving these warnings, got up and went inside the apartment.

Once inside, Detective Walker saw drug trafficking tools such as a money counter, a digital scale, and a "food saver" machine in plain view, which he subsequently photographed. A seizure is authorized under the "plain view doctrine" when three things are established: "(1) the officers lawfully entered the area where the items could be plainly viewed; (2) the

incriminating nature of the items was immediately apparent; and (3) the officers had a lawful right of access to the items." *United States v. Waldrop,* 404 F. 3d 365, 368 (5th Cir. 2005) (citing *Horton v. California,* 496 U.S. 128, 136-37 (1990)). As discussed above, Detective Walker lawfully entered the apartment. The incriminating nature of the items was apparent, as he immediately explained to the Defendant-these are tools of the drug trafficking trade. The officers had a lawful right of access (in this case, the access inquiry blends with the issue of lawful entry). *See Horton,* 496 U.S. at 137.

Accordingly, the search warrant based on Detective Walker's "plain view" sweep of the apartment, Defendant's incriminating statements, and Defendant's surrender of the bong and the marijuana was properly issued based on probable cause. The search revealed distribution quantities of LSD and marijuana as well as a firearm. Because the search warrant is valid and the detectives' conduct, as discussed above, did not violate Defendant's Fourth and Fourteenth Amendment rights, this evidence is admissible.

Conclusion

In accordance with the foregoing,

IT IS ORDERED that Defendant's Amended Motion to Suppress Evidence [#16] is DENIED. SIGNED this the 4th day of June 2007.

/s/ Sam Sparks
SAM SPARKS
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

UNITED STATES OF AMERICA

-vs-

JASON JULES FERNANDEZ

CAUSE NO. A-07-CR-080-SS

ORDER

(Filed June 28, 2007)

BE IT REMEMBERED on this the 28th day of June 2007, the Court reviewed the file in the above-styled cause, and specifically Defendant's Motion for Reconsideration of the Court's Order Denying Amended Motion to Suppress [#32]. Having reviewed the motion, the order, the applicable law, and the case file as a whole, the Court DENIES the motion to reconsider for the reasons that follow:

Facts

Defendant contests the factual record reflected in the Court's June 4, 2007 order. The Court will address each factual contention in turn.

1. Hearing Date:

As a threshold matter, Defendant points out the date of the hearing reflected in the order is incorrect.

The record shall be amended to reflect the hearing was held on May 29, 2007, not June 4, 2007.

2. "The informant also advised Detective Walker that Defendant habitually kept a gun in the residence."

Defendant contests the Court's use of the phrase "habitually" on page 1 of the June 4, 2007 Order (the "Order"). The Court's description of the information provided by the confidential informant (CI) is supported by the transcript. At the hearing, Detective Walker testified "the CI had told us that Mr. Fernandes was in possession of a .45 caliber, semiautomatic handgun." Tr. 30:11-12. The informant had also told Detective Walker Fernandes was selling "large amounts of marijuana." Tr. 40:22-25. These statements together justify an inference that the informer's statement indicated Fernandes kept a gun as part of his marijuana dealing, and therefore kept it "habitually" as opposed to, for example, borrowing it for a weekend. *See, e.g. United States v. Newman,* 472 F.3d 233, 238 (5th Cir. 2006) (agents "were reasonable to correlate violence and weaponry with drug dealing").

The confidential informer's statements were not offered at the hearing for their truth regarding whether Fernandez actually habitually kept a gun or kept a gun in furtherance of drug trafficking. The CI's statements were offered to justify the Detectives' stated apprehension regarding a possible weapon in

the apartment. *See, e.g.* Tr. 30:6-8 (Detective Walker: "Or there was also a question of a weapon involved that we were continuously aware of and were concerned with."); Tr. 72:21-22 (Detective Walker: "I was actually more concerned about whether or not he might retrieve a weapon, I think. . . ."). The Court made a finding that the Detectives reasonably thought, based on the CI's statements and their own experiences, that Defendant might retrieve a weapon from the apartment if he were allowed to go inside alone. Order at 12-13.

Defendant further asserts Detective Walker "testified he did not even have reasonable suspicion that Fernandes was engaged in criminality because he had only been able to verify the location and name provided by the 'concerned citizen' . . . not any of the allegations of criminality." Mot. Reconsider at 2. This statement is not supported by the transcript of the proceedings. At the hearing, attorney David Botsford asked Detective Walker:

> Q. So it would be fair to say you didn't even really have reasonable suspicion to believe that he was dealing in drugs, right?
>
> A. *Unless I could somehow corroborate or verify the reliability of the informant,* I'd agree with you.

Tr. 42:4-8 (emphasis added). Far from testifying he had no reasonable suspicion that Fernandez was involved in criminal activity, Detective Walker testified he required corroboration of the CI's statements

in order to establish reasonable suspicion. Detective Walker verified the name, address, phone number, and car described by the CI before conducting his knock-and-talk. Tr. 18:3-21. The purpose of the knock-and-talk was to corroborate the informant's statements regarding Defendant's criminal activity. Tr: 18:9-14; Tr. 43:20-21. During their interaction with Fernandes, the detectives were constantly evaluating and re-evaluating whether "reasonable suspicion" or "probable cause" existed. This was a legitimate use of the "knock-and-talk" technique. *See Fla. v. Bostick,* 501 U.S. 429, 434-435 (1991) ("even when officers have no basis for suspecting a particular individual, they may generally ask questions of that individual"); *United States v. Zertuche-Tobias,* 953 F. Supp. 803, 829 (S.D. Tex. 1996) (there is "no authority establishing that the officers were not permitted to knock on the . . . door and request to talk to [Defendant].")

3. Defendant submitted a "partial transcript."

Defendant objects to the Court's reference to a "partial transcript" on Page 2 of the Order. Defendant asserts he submitted a full transcript, not a partial transcript, of the knock-and-talk as Exhibit No. 18 at the hearing. While Defendant did submit a transcript as Exhibit No. 18 at the hearing, the United States objected to its accuracy and that transcript was admitted with the limitation "Well, this is tendered as a transcript that Mr. Fernandes has come up with after he and his lawyer have listened to it. That's all it is right now." Tr. 116:22-24.

The "partial transcript" to which the Court refers in the Order is the transcript submitted in the body of Defendant's Amended Motion to Suppress. Prosecutor Doug Gardner stated the United States had no objections to the accuracy of this partial transcript, and both sides relied on this version of the transcript in the direct and cross examination of Detective Walker. *See, e.g.* Tr. 27:5-13; Tr. 31:11-14; Tr. 37:24-25; Tr. 70:13-15; Tr. 83:15-19; Tr. 103:5-15. The version of the transcript admitted as Exhibit 18 was not only admitted with objections as to its accuracy, *see* Tr. 116:15-25, but was also not introduced until the direct examination of Defendant Jason Fernandes, after the examination of Detective Walker was finished.[1] Accordingly, the Court did not rely on this version of the transcript in establishing the facts of the case.

Because both sides agreed the transcript submitted in the body of the Amended Motion to Suppress was "fairly accurate," Tr. 10:18, and both sides relied on this version of the transcript during the hearing, the Court based its factual findings on this version of the transcript as well as the recording of events submitted by the United States, to which Defendant raised no objection. The transcript submitted in the body of the Amended Motion to Suppress does not cover the entire interaction between Fernandes and the detectives. Specifically, there is a portion

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[1] The transcript was referenced in Mr. Botsford's examination of Detective Bryant, with objections. *See* Tr. 166:15-168:5.

"occurring at a minute, 40 seconds into the encounter" that is omitted from the transcript included in the body of the Amended Motion to Suppress. Tr. 11:17-19; *see also* Tr. 51:15-16. The transcript both sides agree is reasonably accurate is, therefore, a "partial" transcript.

4. The "directive" to retrieve bongs

Defendant asserts "On page 2, last full paragraph, the Court has not referenced the fact that Fernandes said that he would get rid of any bongs, as instructed by the detectives, but that despite his stated willingness to get rid of the bongs, the detectives directed him to retrieve them. . . ." This characterization of events is not supported by the transcript, the recording, or even the contested Exhibit 18 "corrected" transcript. All record of this interaction indicates Detective Walker first told Fernandes he would have to get rid of any bongs in the house. *See, e.g.* Am. Mot. Supp. at 6. Fernandes said "Okay." *Id.* Walker then asked Fernandes, "Do you have any bongs in the house?". *Id.* Fernandes replied "Oh, it's just in my garage. I will get rid of them." *Id.* Walker asked again if there were any other bongs in the house, and Fernandes said "No." *Id.* Walker then asked if Fernandes' girlfriend was in the house. *Id.*

Fernandes himself testified he wanted to get the detectives away from the residence because his girlfriend was, at that moment, inside "smoking a blunt in the bedroom." Tr. 119:2-3. Accordingly,

Fernandes responded to Walker's question by saying "I don't want to get her in any trouble." Am. Mot. Supp. at 6. Walker replied "Well, I don't want you to get in any trouble," and suggested "if I can respond to this complaint and say I've spoken to Jason, and he gave me the bong, and I went away, then we're over with it, okay." *Id.* Detective Walker then asked Jason "Do you want to go up and get the bong out of your – " at which point Fernandes interrupted, saying "It's out here," and led the Detectives to a hookah bong in the garage, down the steps and away from the apartment. *Id.* at 7.

Defendant asserts the significance of this exchange is that it indicates "the surrender of the bongs was mere submission to lawful authority," rather than consensual. Mot. Reconsider at 2. This attempt to re-argue a legal conclusion rejected in the Court's first ruling on the Amended Motion to Suppress is no more successful the second time around. Defendant was not responding to repeated demands or orders that he produce the bongs. If anything, he was responding to Walker's repeated attempts to bring the conversation back around to the apartment. Walker's conversational gambits were clever, but were in no way coercive. He never ordered Defendant to bring him the bongs or let him into the apartment. Instead, the Defendant chose to give Walker the bongs in the garage in order to draw him away from the apartment.

Defendant's own testimony supports this characterization of events. Fernandes stated at the hearing:

> I wanted to direct everybody's attention downstairs because I didn't want them to go upstairs because, A, I knew that my house – I mean, we weren't expecting visitors. We weren't ready for police officers certainly to walk through the door. And I didn't know what Jackie was doing. I hadn't had a chance to warn her that there were police officers around. And I certainly, you know – so I didn't want them going upstairs. So I figured, well, there's some bongs downstairs, and I figured I'd give that to them.

Tr. 122:8-16. At no point in his testimony did Ferndandes claim he thought Detective Walker was ordering him to forfeit his bongs. Instead, he testified he thought Walker "sounded like he was giving a warning. . . . Give me your bongs and I'll go – I'll go away." Tr. 123:20-14. Fernandes testified he gave the detectives the paraphernalia in his garage because:

> I just didn't want – I didn't want to give him an idea that he needed to go upstairs in order – see, he told me if I give him the bongs and the weed, then he'd leave. So I didn't want him to get any ideas in terms of wanting to go upstairs and perhaps see anything that was around in my apartment or, you know, see Jackie smoking [marijuana], or something like that.

Tr. 125:12-17. Based on Defendant's own testimony, the Court remains convinced Defendant's production

of his bongs was not coerced submission to a lawful show of authority but instead one of a series of voluntary and calculated decisions intended to conceal from the detectives the fact that Defendant was dealing large amounts of drugs from his apartment.

5. Defendant's statements about his marijuana

Defendant asserts the Court "has not referenced the fact that Fernandes attempted to go up to his apartment on his own to retrieve the marijuana . . . but the detectives would not allow him to do so." Mot. Reconsider at 3. The Court can only direct Defendant's attention to page three of the Order, where the Court describes Fernandes' repeated attempts to enter the apartment on his own and the detectives' repeated explanations that he could not be allowed to do so.

Defendant further claims "the Court has not referenced the fact that Fernandes originally denied having any marijuana." *Id.* Defendant fails to point to any statement he made denying possession of marijuana in any record of the incident. Defendant does not deny smoking or possessing marijuana in the Amended Motion to Suppress, the recording of the knock-and-talk, or even in Defendant's Exhibit 18 transcription of events. In fact, these records reflect Defendant *apologized* three times in response to Detective Walker's statements that someone had reported the smell of marijuana coming out of the residence and Defendant needed to stop smoking and

get rid of his bongs. *See, e.g.* Am. Mot. Suppr.5-6. Defendant asserts Detective Walker "admitted" Fernandes denied having any marijuana, Mot. Reconsider at 3, but does not point out any part of Detective Walker's testimony making this admission. The transcript of the hearing does not support this statement. In fact, Detective Walker testifies he has no memory of Fernandes "originally saying 'no, I don't have any marijuana." Tr. 69:16-24. Nor does the police report of the incident support this contention. Def. Ex. 22. The report says "Detective Bryant inquired if he had any marijuana in the upstairs residence and Fernandes eventually said he did." *Id.* This is consistent with the transcript of events. Bryant asked "Where is your marijuana at? I know you've got at least a dime bag somewhere." Am. Mot. Supp. at 8. Fernandes immediately responded "We have some," but did not explain he had "a little jar" in the apartment until after the detectives told him not to go inside, brought Jackie outside, discussed Jackie's getting her shoes, and so forth. *Id.* "Eventually" reasonably describes this sequence of events and does not necessarily imply that Fernandes ever denied having marijuana.

In any event, had Fernandes denied possessing marijuana in some unrecorded statement, the denial would not have had the legal effect he claims. Defendant asserts "the legal ramifications of these facts" are that Fernandes had been seized and detained, and was submitting to a lawful show of authority. The Court can only direct Defendant's attention to pages

9-11 of the Order denying Defendant's Amended Motion to Suppress. In particular, the Court found on page 9 that the detectives' questioning was not coercive at any point. On page 10, the Court found that "[d]etaining Defendant and his girlfriend outside the apartment . . . did not turn the incident into a custodial investigation; it merely escalated to the level of a 'limited investigative stop,' permissible under *Terry v. Ohio* if there is a 'reasonable suspicion' that a person has committed or is about to commit a crime." Even if Defendant had denied possessing marijuana, the detectives had a "reasonable suspicion" that he did in fact have marijuana on the property because he had voluntarily produced several bongs.

6. Inaudible portion of the tape

Defendant reurges his argument that he did not give any kind of verbal assent to entry. The Court never made any factual finding that he did. In fact, the Order clearly states that "[T]he transcript does not reflect any intelligible response from Defendant." Order at 3. The Court found Walker's testimony that he believed he had consent credible, but whether Defendant did or did not make a verbal statement indicating that Walker had permission to follow him into the apartment is a moot point, as the Order explains. Order at 11-12. First, Detective Walker had explained *four times* that Defendant could not enter unaccompanied. *See Tr.* 107:14. "Even if Defendant's unintelligible utterance was not 'sure' or 'ok' or any other form of assent, he impliedly authorized

Detective Walker's entry by going into the apartment immediately after being advised that he would have to be accompanied by a detective and could not go alone." Order at 12. Moreover, even if Defendant made no sound at all, the fact that he was going into the apartment created an "exigent circumstance" justifying Walker's entry, because Walker reasonably believed Defendant might destroy evidence or grab a weapon once inside. Order at 12-13.

7. Whether Detective Walker stepped back "to the same spot" inside the apartment to take pictures

Defendant asserts Detective Walker did not take pictures from the same spot where he intially stopped when he followed Fernades inside. There is absolutely no legal significance to this asserted fact. Defendant does not claim Walker performed any further search of the apartment before obtaining a warrant. He does not contest Walker's testimony that he took pictures because "the apartment needed to be secured in anticipation of the search warrant." Tr. 106:12-14. To the extent Walker photographed anything that was not in plain view from his original position, this evidence is admissible under the "inevitable discovery" doctrine explained at pages 10-11 of the Order.

8. The value of the marijuana found in Defendant's safe

The Order notes the valid search of Defendant's apartment and garage revealed "$25,000 worth of marijuana in a safe in the garage." Order at 5. Defendant contests this valuation and offers an APD document "reflecting the type, amount, and approximate street value of the narcotic seized." Mot. Reconsider Ex. 5. This document was not in the record at the hearing, and on cross examination Defendant did not contest that Detectives found "1200 hits of LSD . . . , a firearm, and $25,000 worth of hydroponic marihuana" in his home. Tr. 154:10-11. Defendant's Exhibit 22, submitted into evidence by the Defendant at the hearing, establishes police seized "almost three pounds of high quality marijuana. . . . This represents over $25,000 in street value." The Court finds the value of the marijuana was adequately established by this evidence. Moreover, the street value of the marijuana has absolutely no relevance with regard to whether it was properly seized.

9. Reasonable suspicion and alleged misstatements in the warrant application

Defendant asserts the Court ignored his argument that the Detectives did not have reasonable suspicion to justify "directing [Defendant] to come out of his residence and speak with them." Mot. Reconsider at 4. The Court did not ignore this argument, but rejected it. A "knock-and-talk" is an acceptable consensual encounter by which detectives may

establish reasonable suspicion or probable cause. *See* Order at 8. No reasonable suspicion is needed to initiate a knock-and-talk. *Id.* ("a 'consensual encounter' may be initated by police without any objective level of suspicion.") (citing *Florida v. Bostick*, 501 U.S. 429, 435 (1991)). The Detectives' questioning never rose to the level of a custodial interrogation. Order at 10. By the time the incident "escalated to the level of a 'limited investigative stop,'" Defendant had already created reasonable suspicion justifying a *Terry* stop by producing drug paraphernalia and admitting that he had marijuana in his apartment. *Id.*

Defendant further asserts the Court ignored his argument that Detective Walker made material misrepresentations in his application for a, search warrant that invalidated the warrant. Specifically, Defendant alleges "Detective Walker failed to inform the magistrate of the true sequence of events, including the promise bestowed upon the Defendant and the Defendant's acquiescence to lawful authority. . . ." Am. Mot. Supp. 20, n.11; *see also* Mot. Reconsider at 4. The Court has already rejected this argument. Order at 5 ("Defendant argues . . . the search warrant is invalid because it is premised on the incriminating statements and items in "plain view," and both of these grounds are faulty as described above [referencing Defendant's arguments regarding unlawful promises and acquiescence to a show of lawful authority].") Because Detective Walker did not make any promise to Defendant and Defendant's statements were made voluntarily and not in acquiesce to a show of lawful

authority by the detectives, the search warrant was properly issued. *See* Order at 14. Defendant's Motion to Reconsider does not establish that Detective Walker made any promise to Defendant or that Defendant acquiesced to a show of authority. Accordingly, there is no reason to revisit the argument that Walker misrepresented these alleged events in his application for a search warrant.

10. Detectives' instructions to Fernandes

Defendant argues the Detectives never told him "his alternatives were to allow a detective to accompany him or wait outside until the Detectives got a warrant." Order at 13. The detectives did not use the word "warrant," nor did the Court's Opinion attribute that exact language to the detectives. The Court explained the detectives did not "manufacture" exigent circumstances by somehow tricking Fernandes into going into the apartment, but instead clearly explained that he could not do so unaccompanied. *Id.* The quoted language to which the Order refers is Detective Walker's statement "Well, I would prefer that we did this all kind of consensually as opposed to me having to invoke any kind of authority. But if you want, we can just have your girlfriend come out, and we can all wait outside." Am. Mot. Suppress at 8; Order at 3. Detective Bryant then explained "We can't allow you to go in there and retreive illegal narcotics without us going with you. And the reason for that is because that would put you in a situation where you would have to try and destroy them." *Id.*

Whether Defendant explicitly understood the phrase "invoke any kind of authority" as a reference to a search warrant or not, the fact remains that the detectives clearly explained he could either be accompanied into the apartment or he could wait outside for some further proceeding. He could not, in the circumstances, go inside alone. In fact, the officers told Fernandes at least "four times he can't go in without [a detective]." Tr. 107:14. Thus, the detectives did not "manufacture" exigent circumstances. Order at 13. Fernandes's action in entering the apartment after repeated warnings, when the Detectives reasonably suspected he might destroy evidence or retrieve a weapon, created an exigent circumstance justifying Walker's entry regardless of whether Fernandes intended to consent to entry or not. *Id.*

11. Defendant's understanding of his *Miranda* rights

Defendant asserts he did not testify that "he did not know he could ask for a lawyer, refuse to answer questions, or refuse to consent." Mot. Reconsider at 5, quoting Order at 10. Instead, Defendant asserts he testified he was not aware he had the right to refuse to speak to the detectives before they read him his *Miranda* rights. This is a distinction without a difference. The bottom line is that the Court did not find Defendant's testimony that he did not know he could cut off the interview credible. Order at 10. Among other things, Defendant testified he had been attending college in the United States for six years and was

a government major. Tr. 112:2-8; 145:4. Furthermore, the recording of the incident reveals Fernandes asked if he could talk to a lawyer and "get back with you-all" before he was read his *Miranda* rights. Gov't. Ex. 1. His action terminating the consensual interaction was the trigger for the *Miranda* warnings, not vice versa. *Id.* Accordingly, the Court found Defendant "knew his rights and invoked them as soon as he realized he could be in serious trouble." Order at 10. Furthermore, as the Court noted on page 10 of its Order, "proof the suspect had knowledge of a right to refuse is not required for effective consent to a search or questioning. *Schneckloth v. Bustamonte,* 412 U.S. 218, 231-32, 248-49 (1973); *United States v. Gonzales,* 79 F.3d 413, 421 (5th Cir. 1996).

Having reviewed Defendant's contested version of the facts established at the suppression hearing, the Court finds no grounds to restate any factual finding other than the date of the hearing, which occurred on May 29, 2007, not June 4, 2007.

Legal Arguments

I. Voluntariness Analysis and Defendant's Individual Characteristics

Defendant further argues the Court incorrectly analyzed the voluntariness of his statements because the Court did not adequately consider his individual characteristics. "The voluntariness of consent is a question of fact to be determined from a totality of the

circumstances." *United States v. Cooper,* 43 F.3d 140, 144 (5th Cir.1995). The Fifth Circuit considers six relevant factors in evaluating the voluntariness of consent to search, none of which is dispositive or controlling. *United States v. Kelley,* 981 F.2d 1464, 1470 (5th Cir.1993). Those six factors are: "(1) the voluntariness of the defendant's custodial status; (2) the presence of coercive police procedures; (3) the extent and level of the defendant's cooperation with the police; (4) the defendant's awareness of his right to refuse to consent; (5) the defendant's education and intelligence; and (6) the defendant's belief that no incriminating evidence will be found." *Id.*

In this case, the Court considered each of the six factors and found the totality of the circumstances indicated Fernandes voluntarily spoke with the officers, produced several bongs, and admitted he had marijuana in his apartment. The Court found (1) the knock-and-talk was a noncustodial interaction, Order at 8; (2) the detectives did not use any coercive procedures but instead talked to the defendant without restraints, at his own residence, in an area open to public view; *id.* at 9; (3) the Defendant cooperated by coming outside to talk to the police, apologizing for smoking marijuana, and giving the police several bongs; *id.* at 10; (4) the Defendant's statement that he did not know he could refuse consent was not credible because he asked for an attorney and refused to further cooperate before he was read his *Miranda* rights, as soon as he was told he "could be in trouble today." *Id.*; (5) the Defendant's intelligence was such

that he reasonably understood the officers' instructions not to enter the apartment unaccompanied, *id.* at 11; and (6) the Defendant gave officers his bong and marijuana in the (mistaken) belief the officers would not find his larger drug trafficking activities. *Id.* at 3, 10. The Court found Detective Walker's subsequent entry into the Defendant's apartment, where he discovered Defendant's money counter, digital scale, and other drug dealing paraphernalia in plain view, was justified either under the doctrine of inevitable discovery or because the Defendant created exigent circumstances by going inside after the detectives had warned him he could not enter the apartment alone, thereby creating a threat to both officer safety and preservation of evidence. *Id.* at 10-13.

Defendant contends the Court should have taken into account his dyslexia, which he asserts gives him "the tendency to be very literal in terms of his interpretation" and makes it difficult for him to understand implied messages and subtleties. Mot. Reconsider at 12. Defendant now claims his dyslexia caused him to take Detective Walker's statement that "if I can respond to this complaint and say I've spoken with Jason, and he gave me the bong, and I went away, then we're over with it, okay" as a literal promise to go away if he gave up his bongs, making the statement an impermissibly coercive promise of a benefit.

At the hearing, Fernandes testified he has dyslexia and several related learning disorders, but did

not testify his learning disability impacted his understanding of events. Tr. 112:15-25; 113:1-5. Furthermore, Fernandes did not introduce any evidence regarding his learning disability. In support of his motion to reconsider, Fernandes now attaches information from a website on dyslexia, reports from several different schools and special education facilities in India evaluating his learning disability over the years, and, letters granting Fernandes special accommodation in taking the SAT and in coursework at the University of Texas. Mot. Reconsider Exs. 6-15. These documents are in large part inadmissible hearsay. Fed. R. Evid. 802. To the extent the documents are excepted from the hearsay rule as public records or statements for the purposes of medical diagnosis or treatment, they remain unauthenticated documents under Fed. R. Evid. 901 and 902. Several of the documents, such as the generalized website on dyslexia or the notice that defendant was granted more time to take his SATs, are entirely irrelevant to the issue of Fernandes' understanding of the officers' statements during the knock-and-talk. In short, Defendant has not supported his claim that dyslexia impacted his understanding of events with any competent evidence.

Furthermore, even if the Court considers this evidence of Fernandes' learning disability, it is insufficient to convert Detective Walker's statement into an impermissible promise. Detective Walker testified that if he had found nothing more than a bong and a small amount of marijuana, consistent with personal

use, he would have recommended to his supervisor that no arrest be made. Tr. 19:6-25, 20:1-7. At the time he suggested to Fernandes that he could give up the bongs and be done with it, his statement amounted to a good-faith "prediction of future events." *United States v. Rojas-Martinez,* 968 F.2d 415, 418 (5th Cir. 1992).

Defendant argues Detective Walker's statement was an illusory promise rather than a prediction because it was not a "prediction about future events beyond the parties' control or regarded as inevitable." Mot. Reconsider at 17 (citing *United States v. Fraction,* 795 F.2d 12, 15 (3d Cir. 1986); *Hawkins v. Lynaugh,* 844 F.2d 1132, 1139 (5th Cir. 1988)). Defendant contends that, because Walker had the power to decide whether or not to make an arrest, his suggestion that he would make no arrest if Defendant gave up his bongs and marijuna amounted to a promise of leniency. *Id.* What this characterization of events fails to consider is that, had Defendant given up his bongs and marijuana without exposing a money counter, baggies, and other indicia of a thriving home drug trade, Walker had every intention of recommending leniency. *See, e.g.* Tr. 19:6-18. Once Walker saw items suggesting Fernandes was dealing drugs, the situation changed, to say the least.

Rojas-Martinez dealt with a similar situation. In that case, a police officer allegedly "implicitly promised" illegal alien detainees they would be deported rather than imprisoned if they confessed. 968 F.2d at 415. Because deportation was a realistic possibility

until the police found drugs in their possession, the defendants' confessions and consent to search of their possessions were not coerced by the officer's statements. *Id.* Similarly, in *United States v. Scurlock,* the Fifth Circuit rejected a defendant's argument that officers had made an "implied promise of leniency when they told her about similar cases where cooperating defendants had received much lighter sentences than defendants who remained silent. 52 F.3d 531, 536 (5th Cir. 1995). The Court reasoned "A truthful and noncoercive statement of the possible penalties which an accused faces may be given to the accused without overbearing one's free will." *Id.* Detective Walker's statements are indistinguishable from the statements at issue in these cases. He told Defendant, in good faith, that if the defendant gave up his bongs and marijuana, "then we're over with it, okay." Am. Mot. Supp. 8. That was a truthful statement about the probable penalty for revealing personal use marijuana in the circumstances at hand. The fact that Defendant subsequently revealed evidence of a much more serious crime does not retroactively convert this statement into a promise to release defendant from all criminal liability. *See Rojas-Martinez,* 968 F.2d at 415.

Defendant nevertheless asserts the Court should consider the possibility that his learning disorder caused him to *understand* Detective Walker's statements as an unequivocal promise of leniency, rendering Defendant's subsequent incriminating actions

involuntary, whether that understanding was reasonable or not. Voluntariness is to be evaluated according to the totality of the circumstances. *Cooper,* 43 F.3d at 1441; *Kelley,* 981 F.2d at 1470. Though the Court should take account of the "possibly vulnerable subjective state of the person who consents, *Schneckloth,* 412 U.S. at 229, "no one factor is dispositive" in determining whether consent is voluntary. *United States v. Olivier-Becerril,* 861 F.2d 424, 426 (5th Cir. 1988)).

In this case, even taking Fernandes' learning disability into account, the totality of the circumstances weighs against a finding of involuntariness. *See Kelley,* 981 F.2d at 1470. When Fernandes gave the detectives his bongs and admitted to possessing marijuana, he was not in custody. The detectives never attempted to intimidate him in any way. Their interview lasted minutes, not hours. Fernandes agreed to come outside and talk with the police, and never asked to stop the interview or speak to a lawyer until after he had produced his bongs and marijuana and the officers had found his money counter, scale, and baggies. He was aware he had the right to ask for a lawyer and terminate his cooperation, because he did so once the officers found incriminating evidence-before they read him his *Miranda* rights. He is a highly educated and intelligent individual; despite his learning disability, the testimony at the hearing established he has been a student at the University of Texas for the past six years. Finally, Fernandes himself testified he hoped by giving the detectives his

bongs and marijuana he could prevent them from entering the apartment and finding evidence of his drug trade. Tr. 160:14-16.

Moreover, it is permissible to take account of the defendant's actions as well as his claimed mental illness in evaluating the subjective effect of questioning. *See Hawkins v. Lynaugh,* 844 F.2d 1131, 1139, 5th Cir. 1988 (noting the mentally ill defendant "was assertive enough and intelligent enough to demand the anonymity of the person whose car he utilized in the Hamilton murder.") Fernandes, despite his learning disorder, was "assertive enough and intelligent enough" to attempt to draw the detectives' attention away from his apartment by leading them to bongs in his garage. Defendant's testimony at the hearing is that he gave the detectives the bongs in his garage because he "wanted to direct everybody's attention downstairs because [he] didn't want them to go upstairs." Tr. 122:8-9. He further testified he thought Detective Walker's comments about giving up the bongs "sounded like he was giving a warning. He was telling me, stop smoking weed because people are complaining, give me your bongs, and I'll go – I'll go away." Tr. 123:20-22. He further testified that, in response to Detective Walker's questioning about bongs in the apartment, he lied because he "didn't want to give [Walker] an idea that he needed to go upstairs in order – see, he told me that if I give him the bongs and the weed, then he'd leave. So I didn't want him to get any ideas in terms of wanting to go upstairs and perhaps see anything that was around

in my apartment. . . ." Tr. 125:2-17. These statements indicate Defendant made a reasoned choice to feign cooperation in order to draw the detectives away from his apartment.

Defendant further contends the Court should have taken into account his status as an Indian citizen. The testimony at the hearing, however, established Defendant has been in America at the University of Texas for six years and was a government major. Tr. 112:2-8; 145:4. There is no indication Defendant's status as an Indian citizen in any way impaired his understanding of the officers' questions or his rights.

II. The Officers' Misrepresentations Regarding the Purpose of the Investigation

Detective Walker misrepresented to Fernandes that he was investigating a complaint about the smell of marijuana coming from the apartment. He did not tell Fernandes he was actually investigating a tip from a confidential informant regarding Fernandes' alleged distribution of illegal drugs. Defendant argues for the first time in his Motion for Reconsideration that Detective Walker's "misrepresentations regarding the scope, nature, and purpose" of the interview violated his Fourth Amendment rights.

Defendant's belated argument is without merit. The Supreme Court has long recognized that "there are circumstances when the use of deceit is the only practicable law enforcement technique available."

United States v. Russell, 411 U.S. 423, 436 (1973). The Fifth Circuit acknowledges that "any misrepresentation by the Government is a factor to be considered in evaluating the circumstances" indicating whether consent is voluntary or not, *United States v. Andrews,* 746 F.2d 247, 250 (5th Cir. 1984) (overruled in part on other grounds, *United States v. Hurtado,* 905 F.2d 74 (5th Cir. Tex. 1990)), but this is only one factor to be considered. *Id.* The voluntariness of defendant's consent or confession must be evaluated from the totality of the circumstances, even where officers intentionally deceived the defendant about the scope of the interview. *Id.*; *United States v. Davis,* 749 F.2d 292, 296 n.2 (5th Cir. 1985).

Defendant cites three cases from within this circuit where government agents misled a defendant in violation of his Fourth Amendment rights: *United States v. Carriles,* EP-07-CR-00087-KC, 2007 U.S. Dist. LEXIS 38444 (W.D. Tex. May 8, 2007); *United States v. Tweel,* 550 F.2d 297 (5th Cir. 1977); and *SEC v. ESM Government Securities, Inc.,* 645 F.2d 310, 316 (5th Cir. 1981). All three cases are readily distinguishable from the present situation, however, because they involved an "administrative officer [who] represents falsely that the evidence obtained will be used only in a civil investigation." *Andrews,* 746 F.2d at 250-251 (addressing *Tweel,* 550 F.2d 297, and *United States v. Goss,* 650 F.2d 1336, 1348 (5th Cir. 1981).

In contrast, "[t]he instant case involves a defendant dealing with one he knows to be a criminal

investigator conducting a criminal investigation." *Andrews,* 746 F.2d at 251. In these circumstances, "[t]he mere failure of the officers to give an encyclopedic catalogue of everything they might be interested in does not alone render the consent to search involuntary." *Davis,* 749 F.2d at 295. The detectives' "failure to warn [Defendant] that an investigation might result in criminal charges does not constitute fraud, deceit or trickery." *United States v. Prudden,* 424 F.2d 1021, 1033 (5th Cir. 1970). Even assuming Detective Walker "intended to trick the defendant into producing the [evidence] by totally misstating his purpose" does not automatically invalidate Fernandes' confession. *Davis,* 749 F.2d at 296 n.2 (explaining *Andrews,* 746 F.2d at 249).

The key question is whether there is "any evidence that Defendant's will was overborne" by the officers' trickery or any other circumstance. *Andrews,* 746 F.2d at 250. As the Court has previously explained, the totality of the circumstances indicates Defendant voluntarily produced his bongs and admitted possessing marijuana. The detectives' misrepresentation regarding the purpose of the knock-and-talk does not change this analysis.

III. Reasonable Suspicion Justifying a Knock-and-Talk

Defendant attempts to re-urge his argument that the knock-and-talk was not a consensual encounter. He argues that, as a non-U.S. citizen, he "had no

earthly idea" he could refuse to speak with the detectives before he was given his *Miranda* warnings. Mot. Reconsider at 25. This argument is unavailing because "there is no absolute requirement that the government establish that [defendants] knew they could refuse; it is merely one of the factors" in determining consent. *United States v. Gonzales,* 79 F.3d 413, 421 (5th Cir. 1996). Additionally, the Court remains convinced Defendant's later statements requesting an attorney indicate he did know his rights, or at least had the presence of mind to ask questions establishing his rights, throughout the encounter.

Defendant further argues the knock-and-talk violated his Fourth Amendment rights because it was not justified by "reasonable suspicion." The Court directs Defendant's attention to pages 8-10 of the June 4, 2007 Order, explaining that a knock-and-talk is a noncustodial procedure "which may be initiated by police without any objective level of suspicion," *Bostick,* 501 U.S. at 435; see also *United States v. Gould,* 364 F.3d 578, 590 (5th Cir. 2004) (holding officers can make a protective sweep when "reasonable suspicion . . . arises" *after* a consent entry pursuant to a knock-and-talk); *United States v. Jones,* 239 F.3d 716, 720 (5th Cir. 2001) (holding a knock-and-talk is "a reasonable investigative tool when officers seek to gain an occupant's consent to search *or* when officers reasonably suspect criminal activity." (emphasis added)).

Defendant nevertheless argues the knock-and-talk was a de facto *Terry* stop that required reasonable suspicion. He asserts the knock-and-talk was an investigative detention because he was submitting to a lawful show of authority when he stepped outside, and Detective Walker's action in putting an arm around Fernades' shoulder amounted to a constructive detention. The record does not support this characterization of events. Defendant testified he voluntarily came outside and led the Detectives to his garage because he wanted to draw them away from the apartment in which his girlfriend was actively smoking marijuana. Tr. 122:8-16; 125:12-17. As the Court explained at pages 9-10 of the Order, there is no indication Fernandes was "detained" until the officers stopped him from going back inside the house, which did not happen until after Defendant had already produced bongs and admitted to possessing marijuana, providing ample "reasonable suspicion" for a *Terry* stop. *See, e.g. Bostick,* 501 U.S. at 435.

Defendant further argues a "knock and talk" was unreasonable because the officers suspected he had a gun in the house. He cites *Jones,* 239 F.3d at 721, and *United States v. Hall,* 3:05-CR-087-R, 2005 U.S. Dist. LEXIS 19986, *39 (N.D. Tex. Sept. 14, 2005) for the proposition that "a knock and talk is not a reasonable investigative tactic if the detectives have any reason to believe the resident has a gun." These cases in no way support this blanket statement. Both cases address whether exigent circumstances justifying a

warrantless entry into a residence can arise during a knock-and-talk.

In *Jones,* the Circuit rejected defendant's argument that "the danger presented by the handgun [in his apartment] would not have arisen but for the officers' approaching his apartment." 239 F.3d at 720. *Id.* The Court held that a "nugatory" knock and talk begun *after* officers had probable cause for a search warrant could constitute an impermissible "state-created" exigency because officers would be approaching "under circumstances likely to necessitate a protective search of the home." *Id.* (citing *United States v. Vega,* 221 F.3d 789, 799 (5th Cir. 2000)). However, in a situation where "the officers . . . did not observe any criminal activity before approaching [the] apartment that would nullify the purpose of a 'knock and talk' investigation," the knock-and-talk "was a reasonable investigative tactic" and any threat that subsequently arose during the interaction would not constitute a state-created exigent circumstance. *Id.* Conversely, the district court in *Hall* found officers who conducted a "superfluous" knock-and-talk after they "already [had] more than enough probable cause for a search warrant" created any exigent circumstances, and their warrantless entry was therefore not justified. 2005 U.S. Dist. LEXIS 19986, *34-35, 39.

Defendant's case clearly falls within the circumstances justifying a knock-and-talk described in *Jones.* In *Jones,* the detectives were investigating citizen complaints that the apartment was a center

for drug dealing. 239 F.3d at 719. In the instant case, the detectives were also investigating a tip that Fernandes was dealing drugs. In neither case were the detectives using the knock-and-talk to evade the probable cause requirement, but to establish it. *See id.* A knock-and-talk is a reasonable investigative strategy when detectives seek to establish probable cause, even where the agents are investigating an alleged drug dealer and "reasonab[ly] correlate violence and weaponry with drug dealing." *Newman,* 472 F.3d at 238. In this case, the detectives' knock-and-talk did not create exigent circumstances. Defendant created the exigency when he ignored the detectives' instructions not to go inside the apartment unaccompanied, because he could have retrieved a weapon or destroyed evidence. *See* Order of June 4, 2007 at 12-13.

IV. Implied Consent

Defendant once again challenges any finding that he implicitly consented to Detective Walker's entry of the apartment. This is a moot point.[2] As the Court has explained in its Order of June 4 and again, *supra*

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[2] Furthermore, Defendant's argument that it "strains credulity" to believe the inaudible portion of the tape reflects any sound made by him is unavailing. Mot. Reconsider 3, 38. The Court had the same facts before it on May 29, 2007 as the Defendant presents in his Motion, and the Court found Detective Walker's testimony that Fernandes mumbled assent to be credible. Order at 11.

section 6, the detective's entry was justified under either the doctrine of exigent circumstances or the doctrine of inevitable discovery. *See* Order at 10-12.

V. "Stale" Information and Alleged Misstatements in Affidavit for Search Warrant

Defendant argues for the first time in his Motion for Reconsideration that the affidavit underlying the search warrant in this case was based on stale and inaccurate information. Defendant asserts Detective Walker testified he received information from another police officer, but the search warrant affidavit states he "received information from a concerned citizen." Def.'s Ex. 21 A. The transcript does not support this claimed inconsistency. Detective Walker testified a confidential informant "provided him information" about Fernandes' drug dealing, address, car, and phone number, Tr. 16:1-17; the CI "had told us that Mr. Fernandes was in possession of a .45 caliber, semiautomatic handgun," Tr. 30:11-12; and he "was told" by the CI that Fernandes was dealing drugs from his apartment, Tr. 40:22-25.

Defendant further claims the affidavit is misleading in that it identifies the confidential informant as a "concerned citizen" when the CI was actually an informant who had previously been arrested, and the information provided by this informant is not dated and therefore "stale." These caveats are entirely immaterial. The information of the confidential informant standing alone would not have been

enough to establish probable cause for a warrant whether he were a coconspirator or the Pope. His information was, however, enough to justify the consensual knock-and-talk, which provided ample probable cause for the warrant and which occurred on the same day the warrant was issued. Therefore, the warrant was based on adequate, timely information.

Defendant reurges his argument that Detective Walker should have revealed to the Magistrate that he "attempted to lull [Defendant] into agreeing to a consensual entry." Mot. Reconsider at 39. Once again, the Court rejects any impropriety in Detective Walker's underlying actions, and therefore no impropriety exists in his affidavit.

Finally, Defendant argues the affidavit "does not reflect Fernandes' claims to Detective that he had turned over all of the marijuana in his apartment." *Id.* This claim is completely irrelevant, given that the affidavit did state the amount of marijuana Fernandes initially surrendered had a street value of approximately $1180, and Detective Walker further stated in the affidavit that he had seen a money counter, a digital scale, and plastic baggies in plain view in the apartment. Def.'s Ex. 21A. In these circumstances, probable cause for a search would have existed even if Defendant *had* actually given up all his marijuana, instead of continuing to conceal another *three pounds* of marijuana on the premises. Def.'s Ex. 22.

Defendant's forty-one-page Motion to Reconsider exhaustively reargues points already addressed by this Court's Order of June 4, 2007 and attempts to introduce further arguments that should have been raised, if at all, at the hearing on May 29, 2007. The Court remains convinced that the totality of the circumstances surrounding Jason Fernandes' incriminating statements and conduct on January 31, 2007 indicates Fernandes voluntarily confessed to using and possessing marijuana and gave the detectives several bongs, which created reasonable suspicion justifying an investigative detention. *Bostick,* 501 U.S at 435. Defendant then created exigent circumstances justifying Detective Walker's entry into his apartment when he darted inside to retrieve $1180 worth of marijuana despite both detectives' repeated warnings that he could not go inside unaccompanied. *United States v. Vasquez,* 953 F.2d 176, 180 (5th Cir. 1992). Alternatively, the items discovered by Detective Walker when he followed Fernandes into the apartment are admissible under the inevitable discovery doctrine because Walker already had sufficient probable cause to obtain a warrant when he entered, and the items would have been discovered pursuant to a lawful search. *Nix v. Williams,* 467 U.S. 431, 444 (1984).

Conclusion

Accordingly,

IT IS ORDERED that Defendant's Motion for Reconsideration of the Court's Order Denying Amended Motion to Suppress [#32] is DENIED.

SIGNED this the 28th day of June 2007.

/s/ Sam Sparks
SAM SPARKS
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 07-51100

UNITED STATES OF AMERICA

Plaintiff-Appellee

v.

JASON JULES FERNANDES

Defendant-Appellant

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Appeal from the United States District Court
for the Western District of Texas, Austin

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ON PETITION FOR REHEARING
AND REHEARING EN BANC

(Filed Aug. 5, 2008)

(Opinion 7/10/08, 5 Cir., ___, ___ F.3d ___)

Before HIGGINBOTHAM, DAVIS, & BARKSDALE, Circuit Judges.

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FED. R. APP. P. and

5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor, (FED. R. APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service and not disqualified not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Rhesa H. Barksdale
United States Circuit Judge